Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

DR. JOSEPH C. DEBLASE, AND BEN CERRA,

Petitioners,

v.

CIGNA INDIVIDUAL FINANCIAL SERVICES COMPANY, CIGNA CORPORATION; CIGNA SECURITIES, INC.; NICHOLAS DISETTE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the decision of the Eighth Circuit Court of Appeals, in affirming without opinion the decision of the District Court, conflict with and ignore decisions of the controlling state court of last resort (the Missouri Supreme Court), where jurisdiction is based on diversity of citizenship, contrary to this Court's opinions?

2. Does the decision of the Eighth Circuit Court of Appeals, in affirming without opinion the decision of the District Court, improperly condone, contrary to Rule 56 of the Federal Rules of Civil Procedure and this Court's opinions regarding summary judgment, the weighing of evidence in favor of the moving party and against the non-moving party?

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OPINIONS AND ORDERS BELOW

The decision of the Eighth Circuit Court of Appeals, dated November 17, 1994, is an unpublished Per Curiam opinion, and is set out in the Appendix at A-1. The District Court's opinions and the judgments entered, May 27, 1993 (A-4) and March 29, 1994 (A-19), granting the respondents' Motions for Summary Judgment, are unpublished.

JURISDICTION

The Court of Appeals entered its judgment on November 22, 1994. Following the granting of a request for an extension of time, petitioners filed a timely Petition for Rehearing, which was denied on January 19, 1995. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE, RULE AND CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment of the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

Rule 56, Fed. R. Civ. P., provides in pertinent part as follows:

> (c) Motion and Proceedings thereon. [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

> fact and that the moving party is entitled to a judgment as a matter of law . . . .

STATEMENT OF THE CASE

Petitioners filed their claims in state court (June 1991), alleging three (3) theories of recovery in five separate counts: Fraud (Count I for common law fraud, and Count V for violations of the Missouri Merchandising Practices Act, RSMo. § 407.020 *et seq.*); Breach of Fiduciary Duty (Count II); and Negligence (Count III for the negligence of the individual Respondent and Count IV for the negligence of the corporate respondents). Respondents removed the matter to Federal District Court based upon diversity jurisdiction.

Respondents filed a motion for summary judgment on the fraud-based counts. On May 25, 1993, within days of a June 7 trial, the District Court granted respondents' motion for summary judgment. Because respondents filed the original motion *only as to the fraud counts*, petitioners sought (by telephone request) clarification of the extent of the District Court's order. On May 27, 1993, the District Court issued an amended order granting summary judgment as to <u>all</u> counts. (App. A-4).

Petitioners filed a motion asking the District Court to reconsider its order, since respondents' motion had only addressed the fraud-based counts and not the negligence counts. On November 17, 1993, the District Court issued its

Second Amended Order, repeating its earlier position granting summary judgment as to the fraud-based counts, but granting petitioners' motion to reconsider and reinstating the negligence counts and the fiduciary duty count.

On December 30, 1993, respondents filed yet another motion for summary judgment, this time focusing on the negligence counts and the fiduciary duty count. The District Court granted that motion on March 29, 1994 (App. A-19).

On May 10, 1994, petitioners filed their Notice of Appeal to the Eighth Circuit Court of Appeals. Because the Missouri Supreme Court has accepted transfer of a case factually similar, and addressing the same critical legal issues as this case, petitioners asked the Eighth Circuit to withhold any ruling until the Missouri Supreme Court had issued its opinion. On November 22, 1994, the Eighth Circuit denied petitioners' motion to consider the Missouri Supreme Court's pending opinion. On that same day, in a Per Curiam Order, the Eighth Circuit affirmed the District Court, without addressing any of the issues raised by the petitioners. On January 19, 1995, the Eighth Circuit denied petitioners' request for rehearing.

1. Statement of the Facts

Petitioners invested substantial funds on the advice of respondent Nicholas DiSette (DiSette). Petitioners' evidence was that DiSette lied to the petitioners regarding the nature of the investments he was recommending, and lied to

petitioners concerning whether they needed to read the accompanying offering materials, which revealed the true nature of the investments. There was a factual dispute about whether one of the petitioners, Ben Cerra ("Cerra"), actually received the offering materials.

Neither petitioner was sophisticated in investing his money. DiSette himself admitted that Cerra was not a sophisticated investor. (DiSette depo., p. 180). Cerra testified: "I didn't understand the whole financial end of money, any kind of money, and I didn't know what I should or not be doing [with his income]." (Cerra depo., p. 18).

In short, when DiSette told Cerra that Cerra could build houses but not do financial planning, DiSette was "very right." (*Id.* at p. 50). Before meeting DiSette, the highest income Cerra had ever earned in one year was $40,000.00. (*Id.* at p. 11). Mr. Cerra's entire prior investment history consisted of a few certificates of deposit and two IRA's. (*Id.* at p. 16).

Dr. Joseph DeBlase ("DeBlase") was a successful doctor. He was also an "experienced investor." However, he was anything but a successful investor. DeBlase

> . . . was so busy with medicine that I didn't pay any attention to my financial business. I didn't know about planning, I lost money, it seemed like most of the investments I made weren't good, and I needed someone to do this

> for me. Because I didn't understand why, you know, something looked good to me and it didn't turn out to be good.

(DeBlase depo., p. 47). DiSette said that DeBlase needed help badly. (*Id.* at p. 47).

In the early 1980s, DeBlase became acquainted with DiSette, an investment advisor who worked with Respondent/ Appellee CIGNA Individual Financial Services ("CIGNA"). (Depo. of DeBlase, p. 33-34). DiSette convinced DeBlase that DeBlase should pay DiSette Twelve Thousand Dollars ($12,000.00) per year for DiSette's advice. DiSette became the paid financial advisor of DeBlase. (Answer of Defendants to Amended Complaint, ¶ 7, p. 2).

While Cerra had a good year in 1986, he knew from experience that good years come and go. Cerra believed that within three years, business would probably fall off. (Cerra depo., p. 15-16). As a result, Cerra was interested in preserving the income from that good year to have at his disposal when the housing market changed. (*Id.*, p. 34) DeBlase suggested to Cerra that Cerra meet with DiSette; DiSette charged Cerra Six Thousand Dollars ($6,000.00) per year to be Cerra's paid financial advisor. (Answer of Defendants to Amended Complaint, ¶ 12, p. 4).

DeBlase and Cerra had similar investment objectives. DeBlase's objectives were a dependable income for his wife, an emergency fund for illness, a guaranteed income in case

of disability, and retirement income. (DeBlase depo. at p. 61). He "wanted things that [he] could derive an income from, so that when [he] retire[d] [he] would have a good income and [his] quality of life would not change." (*Id.* at 58). Cerra "was looking for somebody who could help [him] to put [his] money away to where [he] would not hit the downfalls as they're in [his] business financially." (Cerra depo., p. 15). He wanted "safe investments that were liquid enough that [he] could obtain in a no more than a four-year time frame." (*Id.* at 34; *see also* pp. 40 through 41). In spite of that, DiSette recommended that both invest primarily in high risk, highly leveraged real estate limited partnerships.

CIGNA had procedures in place concerning the recommendation of investments, and the review of advisors like DiSette. (*See* depo. of Robert Clark, at pp. 43-44). Mr. Clark is vice-president of CIGNA Securities. (Clark depo., p. 29) James Lasater, Manager/Regional Vice-President, Kansas City, admitted that it was his responsibility as DiSette's supervisor to review DiSette's activities, and review the investment objectives of the client. (Lasater depo. at pp. 95-96). Clark testified that it would not be appropriate to instruct a client not to read the subscription documents before signing. (*Id.*, at pp. 90-92). He also said it is unusual for the producer/agent to maintain the Private Placement Memoranda (PPMs) in his office, rather than deliver them to the client. (*Id.* at 92). The producer of an investment, like DiSette, should discuss the risks of an investment with the client. (*Id.* at 72). Lasater said, "I cannot imagine somebody not delivering a prospectus." That, according to Lasater, would be inappro-

priate. (*Id.*, at p. 77). Lasater also acknowledged that it would be improper to recommend the purchase of an investment that would be inconsistent with the objectives of the investor. (*Id.* at 83).

The limited partnerships had lengthy offering materials, which showed the risks and the nature of the investments. DiSette discouraged DeBlase and Cerra from reading these materials, in spite of CIGNA's rules to the contrary, as identified by Lasater. DiSette told DeBlase, "You don't need to read these documents. This is what you are paying me to do." (DeBlase depo., p. 97 and p. 109). DiSette presented DeBlase and Cerra with a large stack of documents, and said, "Sign on the line indicated." (*Id.*, p. 103). The signature lines would be "flagged" with yellow post-it notes, and DiSette would flip through the pages while the client signed. (DiSette depo., p. 169). Sometimes, DiSette would bring only the signature pages for his clients' review. (DeBlase depo., p. 103). In Cerra's case, ***DiSette did not provide him with the actual offering materials***, but with the signature pages only. (Cerra depo., pp. 81, and 121).

The language on the signature pages included statements that the investors had read the materials that accompanied the pages – DiSette, of course, knew that this was not true. Some investments required an investment advisor, since DeBlase and Cerra were not considered accredited investors. On those occasions, DiSette enlisted the help of two professionals – one, an attorney and the other an accountant – to lend their names to the materials, to give the

impression that the "advisors" had actually offered advice. In fact, Cerra never even met the "advisors", and did not know they had lent their names to the investments. Predictably, given the high-risk nature of the investments, the investments failed miserably, with petitioners losing more than One Million Dollars ($1,000,000.00).

1. This Court should issue a writ of certiorari because the Eighth Circuit's ruling is inconsistent with decisions of the court of last resort in this jurisdiction for claims based on state common law, namely, the Missouri Supreme Court. Further, the decision of the Eighth Circuit is inconsistent with it's own opinion in *Jacobs Manufacturing Company v. Sam Brown Company*, 19 F.3d 1259 (8th Cir. 1994).

The sole basis for the ruling of the District Court, and presumably, the Eighth Circuit, are the written descriptions of the investments contained in the offering materials. Those writings, assuming petitioners ever saw them[1], differed drastically from the verbal representations – the lies – of DiSette.

The first threshold is the assumption that the petitioners received the PPMs to begin with. Cerra testified that he never received them. DiSette kept the PPMs in his office. The only documents Cerra ever saw were the signa-

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[1]Indeed, the trial would have had to engage in fact finding to conclude that the petitioners received the materials, since there existed a factual dispute on that issue.

ture pages DiSette flashed in Cerra's face when they needed to be signed; the forms were blank when Cerra signed them. DeBlase testified that he did not see the materials on all the investments, and was told the same as Cerra – DiSette "would turn to this and say 'sign here,' and I would sign, and he would turn to the next tab, 'sign here,' and I would sign." DeBlase depo., p. 103. DiSette himself confirmed that he would deliver the subscription documents with post-it notes for signatures. DiSette depo., p. 169. Always, DiSette would repeatedly tell Cerra and DeBlase that they did not need to read the PPMs; that was DiSette's job.

The Missouri Court of Appeals has recently given a strong indication of what the Missouri Courts think of the kind of behavior exhibited here by DiSette. In *Cochran v. Giddens*, 1994 WL 160351 (Mo. App. E.D. May 3, 1994), petitioners told their financial planner that their goals and objectives were as follows:

> 1. Preservation of capital is the primary concern. It is more important to receive a return of capital than a return on capital.
>
> 2. Diversification is the key to successful investing . . . .
>
> 3. There should exist adequate income upon retirement to maintain their current life style.

4. When possible, tax advantages should be used to reduce current taxable income.

Id., p. 1. These are identical to the objectives of DeBlase and Cerra. The issue in *Cochran* was whether the plaintiffs were on notice of the fraud, thus triggering the statute of limitations. Respondents argued that, *by virtue of the written material setting out the risks*, plaintiffs were on notice. In that case, plaintiffs received several lengthy, single-spaced prospectuses; here, there is a factual dispute about whether both petitioners actually received those materials.

The defendant in *Cochran* verbally assured the plaintiffs that the investments were not risky. The plaintiffs said that they "'trusted [Planner] completely throughout our dealings with him. He was the expert. We told him we had no experience or education concerning these types of investments and that we were trusting him to protect our interests.'" *Id.* at p. 3.[2]

The *Cochran* decision is consistent with Missouri law, which entitles a person to rely on the representations of another, *even if the hearer has access to the same information as the person making the misrepresentation*:

> Where a distinct and specific representation is made to be acted upon, however, and action is induced, the representee has the right to rely on the representation *even if the parties stand upon an equal footing or have equal knowl-*

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[2] Compare that to statements of DeBlase and Cerra. Cerra did what DiSette told him, because he had all the confidence in the world in DiSette. (Cerra Depo., p. 75). "There was a time he was going to be the executor of my will. I trusted anything he said." (DeBlase depo., p. 117).

> *edge or means of information as to the subject matter, or even if the representation is one not calculated to impress a person of ordinary prudence.*

Essex v. Getty Oil Company, 661 S.W.2d 544, 550 (Mo. App. 1983), emphasis added, citing *Cantley v. Plattner*, 228 Mo. App. 441, 67 S.W. 2d 125 (1934), cited in *Cantrell v. Superior Loan Corp.*, 603 S.W.2d 627, 637 (Mo. App. 1980). In other words, even if the investors had equal access to the offering materials, where the investment advisor makes a distinct and specific representation as to the nature of the investment, the investor has the right to rely on that representation.

Because of that, the Missouri Court of Appeals decided that the written materials did not put the investors on notice of any damages that would trigger the statute of limitations for fraud, and the Court of Appeals would reverse and remand. The Court transferred the case to the Missouri Supreme Court, because of the importance of the issues to be decided. Clearly, the Missouri courts believe that an investor can rely on what his advisor tells him, even if it is contrary to written statements.

In the District Court opinion here, the Court acknowledged that DiSette instructed the petitioners not to read the PPMs. (App. A-10). In spite of those instructions, the District Court placed the burden on the petitioners to investigate the veracity of what their paid financial planner told them.

Counsel for the petitioners here, upon information and belief, represents to this Court that besides the notice issue, other issues germane to this case, such as the nature of the fiduciary relationship of an investment advisor to the

investors, are before the Missouri Supreme Court in the *Cochran* appeal. That case was argued before the Missouri Supreme Court in early November 1994, and is ripe for a decision. Petitioners here moved the Eighth Circuit for a delay in any ruling, pending the very important ruling of the Missouri Supreme Court, but that motion was denied without any reasons given. The *Cochran* opinion is an "all-fours", dispositive case – wouldn't it be prudent, in this state court, diversity case, to at least wait and see what the Missouri Supreme Court is going to do, especially when the Missouri Court of Appeals decided the issues favorably to the petitioners here and contrary to the Per Curiam Order? This circumstance makes this case an exceptional candidate for this Court to grant, vacate and remand the case to the District Court, pending the imminent decision of the Missouri Supreme Court. Likewise, the case is a candidate for holding until the Missouri Supreme Court has issued its opinion in *Cochran*.

In *Jacobs Manufacturing Company v. Sam Brown Company*, 19 F.3d 1259 (8th Cir. 1994), the Eighth Circuit addressed the significance of written representations *vis a vis* oral statements. Brown was a distributor of Jacobs, and signed annual distributorship agreements that had a one-year term. However, Jacobs verbally represented to Brown that the relationship would last "a lifetime." Brown relied on the oral representations, although they were *contrary to the written agreement*; the District Court vacated a jury verdict in favor of Brown, on the same premise used here:

> . . . Brown's reliance on the verbal representations was not justified as a matter of law, because the verbal representations conflicted with the express terms of the written distributorship agreements. This view is *unsupported by Missouri law*, however."

Id. at 1264 (emphasis added). The Eighth Circuit explained:

> In a Missouri fraud case, it is ***for a jury to decide whether a party may rely on verbal representations that conflict with a written agreement***. *Pinken v. Frank*, 704 F.2d 1019, 1024-26 (8th Cir. 1983); *Essex [v. Getty Oil Company]*, 661 S.W.2d 544, 550. Thus, Brown's reliance on Jacobs's [sic] verbal representations could be justified, even though the verbal representations contradicted the distributorship agreements' one-year terms and reservation to Jacobs of the right to sell directly to the original equipment manufacturers.

Id., (emphasis added). The Court concluded, "It was for the jury to decide whether Brown's reliance on Jacobs' verbal representations was justified." *Id.*, (emphasis added).

As here, the District Court in *Jacobs* made several subsequent rulings based on that one premise; that is, that a party cannot rely on oral representations that are contrary to written language. The Eighth Circuit reversed the District Court's subsequent rulings based on that premise. Indeed, the Eighth Circuit held that the District Court's rulings were

> . . . infected by the District Court's *legally incorrect view* that Brown could not justifiably believe Jacobs' verbal representations over the written agreements' terms, *see* 792 F. Supp. at 1537, as we have already pointed out.

Jacobs, at 1267 (emphasis added). The Eighth Circuit concluded that the District Court had a "misconception of Missouri law."

This is a Missouri common law case, with absolute deference given to Missouri state law. This is not a federal securities action, but a Missouri common law fraud and breach of fiduciary duty action. Missouri courts do not allow investment advisors to lie to their clients, and specifically, the Missouri Supreme Court is addressing this very issue.

2. **This Court should issue a writ of certiorari because the Eighth Circuit's ruling is inconsistent with Missouri common law, and the Supreme Court of the United States' opinion in *Salve Regina College v. Russell*, 111 S. Ct. 1117, 1125 (1991).**

In this diversity case, this Court must review the District Court's determinations of state law de novo, giving the determinations no deference. *Salve Regina College v. Russell*, 111 S. Ct. 1117, 1125 (1991). De novo review means that the court should review the case anew, giving appropriate consideration to state law. In a case involving the loss of over one million dollars at the hands of an unscrupulous fiduciary advisor, a de novo review should result, in the minimum, in a well-reasoned opinion explaining why the courts sanction fraud and lying.

Had the Eighth Circuit given proper deference to the opinions of the Supreme Court of the State of Missouri, the Eighth Circuit would not have allowed the injustice of the District Court to stand. The District Court's conclusions are clearly contrary to the common law in Missouri, and should be reversed.

3. **This Court should issue a writ of certiorari because the Eighth Circuit's ruling is inconsistent with Missouri common law, and specifically, *Vogel v. A.G. Edwards*, 801 S.W.2d 746 (Mo. App. 1990),**

holding that an investment advisor has a fiduciary relationship with his clients.

The law in Missouri is that an investment advisor is, as a matter of law, a fiduciary in relation to his clients. "Missouri courts have uniformly held or stated that a stock broker owes a fiduciary duty to his customer." *Vogel v. A.G. Edwards*, 801 S.W.2d 746, 751 (Mo. App. 1990), citing *Leuzinger v. Merrill, Lynch, Fenner and Smith, Inc.*, 396 S.W.2d 570, 575 (Mo. banc 1965), and *Mercantile Trust Company v. Harper*, 622 S.W.2d 345, 349 (Mo. App. 1981). As the *Mercantile Trust* court stated:

> . . . the relationship between a stockbroker and his customer is that of agent and principal. Owing a fiduciary duty to the customer, the broker has an *'obligation to keep the customer fully informed of all facts pertinent to transactions in which the broker is representing the principal, to make full disclosure of all facts which materially affect the subject matter of the agency, and to exercise reasonable care and diligence in the performance of his duties.'*

Mercantile Trust, 622 S.W.2d at 349 (emphasis added).

While the *Vogel* case dealt with a discretionary account, it did note that the broker's duties in a non-discretionary account such as petitioners':

> . . . are, nonetheless, fiduciary duties. The broker must study a stock before recommending it and inform the customer of the risks involved in the particular transaction. Beyond that, the duties are to refrain from self dealing and misrepresentation, follow the

> customer's order and disclose any personal interest in the transaction.

Vogel, 801 S.W.2d at 752, citing ***Leib v. Merrill, Lynch, Pierce, Fenner and Smith, Inc.***, 461 F. Supp. 951 (E.D. Mich. 1978). The *Vogel* opinion also pointed out that, while it was a state court case, federal courts followed the same principle:

> This is the understanding of Missouri law by our colleagues in the federal courts:
>
> Missouri law clearly imposes general obligations and duties upon stock brokers. The general rule is that the relationship of the broker to its customer is fiduciary and confidential.

Vogel, 801 S.W.2d at 752, citing *Smith v. Smith, Barney, Harris and Upham & Co., Inc.*, 505 F. Supp. 1380, 1387 (W.D. Mo. 1981).

As such, DiSette owed certain duties to DeBlase and Cerra. Among those duties, DiSette owed petitioners an obligation to inform them of the risks of the particular investments. There is a sharp dispute in the facts about whether DiSette informed petitioners of the risks associated with the investment of over a million dollars – petitioners testified that DiSette told them that the investments were safe. The only way the District Court could conclude that the DiSette properly informed petitioners would be for the District Court to improperly weigh evidence in favor of the respondents.

As the procedural history of this case shows, the District Court initially granted summary judgment as to all counts, then reconsidered that position as to the negligence

and fiduciary duty counts, because the defendants had not set out sufficient facts to support summary judgment on those counts. Yet, the *only facts defendants recited* in support of summary judgment on the negligence and fiduciary duty counts *were the findings of fact by the court in its first order.* In other words, the court had earlier ruled that there were not sufficient facts for summary judgment, but later, based on *its own findings of fact*, the court granted summary judgment.

Such weighing of evidence is contrary to the law of this Court, as set out in several recent decisions. "In ruling on a motion for summary judgment, '[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Reves v. Ernst & Young*, ___ U.S. ___ 113 S.Ct. 1163, 122 L. Ed.2d 525 (1993), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). On a motion for summary judgment, the moving party bears the burden of proof. *Aetna Life Ins. Co. v. Great National Corp.*, 818 F.2d 19, 20 (8th Cir. 1987).

The Court, therefore, must believe petitioners' evidence – DiSette lied to the petitioners and did not give them the PPMs. For the District Court to conclude otherwise is the result of improper inferences drawn in favor of the respondents.

4. This Court should issue a writ of certiorari because the Eighth Circuit's ruling is inconsistent with *Umpleby by and through Umpleby v. United States*, 806 F.2d 812 (8th Cir. 1986).

Besides the fraud and fiduciary duty counts, petitioners pleaded counts of common law negligence. Petitioners alleged that DiSette was negligent in recommending the investments to begin with, considering the

investment objectives stated by the petitioners. Further, petitioners alleged that CIGNA was negligent in failing to properly supervise DiSette in his recommendations to the petitioners. The District Court, relying on the erroneous conclusion that DiSette owed no duty to petitioners, granted summary judgment. Ironically, the District Court had earlier conceded, in its Order of May 27, 1993, that ". . . DiSette's alleged assurances to plaintiffs may have been poor counsel . . . ." (A-12, n. 10, emphasis added). Isn't poor counsel negligence?

Almost by definition, summary judgment in a negligence case requires finding facts for one of the parties. The Eighth Circuit's decisions support that proposition. In *Umpleby by and through Umpleby v. United States*, 806 F.2d 812 (8th Cir. 1986), a Federal Tort Claims Act case, the Court wisely observed that:

> Since tort actions generally encompass a multitude of factual issues and abstract situations, such actions are usually not appropriate for disposition by summary judgment.

Id. at 815. As the Fifth Circuit put it:

> Summary judgment will not usually be as feasible in negligence cases, where the standard of the reasonable man must be applied to conflicting testimony, as it is in other kinds of litigation. [citations omitted.] Even when the facts underlying the issue of negligence are undisputed, the issue must still be submitted to the jury if reasonable men could reach different conclusions and inferences from those facts. [citation omitted.] Of course, it would be a mistake to conclude that

> summary judgment is never appropriate in a negligence action, *but the circumstances in which it is proper are rare.*

Croley V. Matson Navigation Company, 434 F.2d 73, 75 (5th Cir. 1970) (emphasis added).

The commentators share that view. "[A]lthough a motion for summary judgment under Rule 56 may be made in any civil action, it is not commonly interposed, and even less frequently granted, in negligence actions." Wright, Miller & Kane, *Federal Practice and Procedure*, Vol. 10A, § 2729.

> It is not surprising that summary judgment is seldom sought or granted in negligence actions. Judge and jury each have a specialized function in negligence actions and particular deference has been accorded the jury in this class of cases in light of its supposedly unique competence in applying the reasonable man standard to a given fact situation.

Id. It is even more difficult for a defendant to prevail on a summary judgment motion when it is based on the assertion that there is no factual dispute regarding an issue of negligence or contributory negligence, since those questions are thought of as being within the special competence of the jury. *Id.*, 1993 supplement, emphasis added.

Recall that the *Vogel* case imposes on brokers a duty to investigate investments before recommending them. One of three things took place here. The first possible scenario is that DiSette investigated the investments as required, but did so negligently, and failed to discern the risk involved; in that case, he negligently recommended the investment. The

second alternative - he failed to perform any investigation at all, and therefore breached his duties under *Vogel*. The third alternative is that he competently investigated the investments, found them to be high risk, but nevertheless recommended them to his clients. Respondents' own expert testified that this would be negligent. "If their primary investment objective was to preserve capital and not put any of their dollars at risk, then these types of investments would not be suitable." (Deposition of Joan Lavell, p. 42).

To reach its conclusions, the District Court had to engage in fact finding to the extreme degree. The District Court acknowledged in an Order dated March 29, 1994 that DiSette had a duty to inform his clients of the risks in the investments, citing *Vogel*, at A-23. To grant summary judgment on negligence, the Court has to conclude that *petitioners* were *both 100% negligent*, and that the *respondents* were *not negligent at all*. This Court must ask whether a reasonable person could find that DiSette was even one percent negligent in making the investment recommendations he made or whether CIGNA was one percent negligent in its supervision of DiSette.

The District Court completely ignored petitioners' claims of negligence against CIGNA, reasoning that if DiSette could not be negligent, neither could CIGNA. Petitioners' claims against CIGNA are separate and distinct, and stand alone – CIGNA owes duties to the petitioners that are unique to CIGNA.

CIGNA's representatives testified that it would be inappropriate to instruct a client not to read the PPMs before signing subscription documents. Further, it is unusual for the agent to maintain the PPMs in his office and not deliver them to the client. According to DiSette's supervisor, DiSette should have discussed the risks of the investment with the

client. Finally, DiSette's supervisor, James Lasater, acknowledged that it is the obligation of the supervisor, Lasater, to see that these things are done properly. It is quite possible that a jury could find CIGNA negligent without finding DiSette negligent.

These facts are enough to have submitted this case to a jury for determination.

The facts presented to the court by the petitioners, which the court must take as true, are that DiSette knew the investment objectives of the petitioners – other words, DiSette knew that petitioners both wanted safe, income producing investments. As the plaintiffs in *Cochran*, *infra.*, put it, they would rather have a return *of* capital than a return *on* capital. With those objectives in mind, DiSette nevertheless put the petitioners in high risk investments.

5. This Court should issue a writ of certiorari because the absence of an opinion here will lead to confusion, especially when the apparent outcome is a sanctioning of fraudulent behavior by investment advisors.

A very disappointing aspect of the Per Curiam order is that it fails to explain any rationale for the ruling. Although it purports to adopt the reasoning of the District Court, this only leads to confusion because of the District Court's ruling.

The opinion of the District Court appears to sanction misrepresentations and fraud – *lying* – by investment advisors. In a nutshell, the ruling concludes that as long as written materials are given to an investor, even though

incomplete[3], an investment advisor may lie to the investor and misrepresent the nature of the investment. Remember, petitioners' evidence was that DiSette told them the investments were safe, low-risk investments – this must be believed on a motion for summary judgment. Accepting petitioners' evidence as true, the only conclusion can be that it doesn't matter if an investment advisor lies to his client.

CONCLUSION

In this Missouri common law case, the parties are entitled to the application (and an analysis of that application) of Missouri law. It is an injustice of the worst kind to ignore a pending Missouri Supreme Court decision, which would be dispositive of the issues here. If this Court refuses to rehear the appeal, and the Missouri Supreme Court comes down in favor of the plaintiffs, it will be too late for these petitioners to enjoy the law of the state of Missouri as enunciated in that Opinion.

Respectfully submitted,

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Attorneys for Petitioners

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[3] The evidence was that the only written materials conclusively given to the appellants was a signature page that suggested they had read other, more detailed, materials. The undisputed evidence of Ben Cerra was that he had not received those more detailed materials; Joe Debase could not remember whether he got them or not. Even if he had, DiSette told Debase not to read them.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 94-2250WM

Dr. Joseph C. DeBlase; Ben Cerra,
Appellants,
v.

CIGNA Individual Financial Services Company; CIGNA Corporation; CIGNA Securities, Inc.; Nicholas DiSette,
Appellees.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: November 16, 1994
Filed: November 22, 1994

Before FAGG, WOLLMAN, and HANSEN, Circuit Judges.

PER CURIAM.

Joseph C. DeBlase and Ben Cerra appeal the district court's orders granting summary judgment on DeBlase's and Cerra's claims for fraud, negligence, and breach of fiduciary duty. We review a grant of summary judgment under a well established standard. Because this is a diversity action, we review de novo questions of state law. Having considered the

record and the parties' briefs, we are satisfied that the issues do not warrant a comprehensive opinion and that the record supports the district court's rulings. We thus affirm the district court. See 8th Cir. R. 47B.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2250WMKC

Dr. Joseph C. DeBlase; Ben Cerra,
Appellants,

v.

CIGNA Individual Financial Services Company; CIGNA Corporation; CIGNA Securities, Inc.;
Nicholas Disette,
Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 19, 1995

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 91-0642-CV-W-2

Dr. Joseph C. DeBlase and
Ben Cerra,
Plaintiffs,

vs.

CIGNA Individual Financial Services, et al.,
Defendants.

AMENDED ORDER

I. INTRODUCTION

Pending before the court is defendants' motion for summary judgment. Plaintiffs are seeking to recover funds lost in various investments orchestrated by defendant, DiSette, who was allegedly acting within his capacity as an employee of the other three defendants (known collectively herein as CIGNA).[4] Plaintiffs filed this action in state court and

[4] The other named defendants are CIGNA Individual Financial Services Company, CIGNA Corporation and CIGNA Securities.

defendants subsequently removed to federal court. On January 29, 1993, plaintiffs filed an Amended Complaint which states five counts: Count one alleges that DiSette, acting as an employee of CIGNA, made fraudulent representations to plaintiffs concerning investments; Count Two alleges that DiSette, acting as an employee of CIGNA, violated his fiduciary duty to plaintiffs; Count Three alleges as an alternative to Counts One and Two, that DiSette, acting as an employee of CIGNA, acted negligently towards plaintiffs; Count Four alleges that CIGNA was negligent in hiring and supervising DiSette; and Count Five alleges that defendants' actions were unlawful under the Missouri Merchandising Practices Act, specifically Mo. Rev. Stat. § 407.020.1 (1986). Plaintiff also seeks punitive damages in Counts One, Two and Five.

Defendants move for summary judgment arguing that: (1) Plaintiff DeBlase's action is precluded (for the most part) by the controlling statute of limitations; and (2) Written disclosures to the plaintiffs negate all claims flowing from alleged oral representations made by DiSette to plaintiffs.

II. STANDARDS GOVERNING SUMMARY JUDGMENT

A movant is entitled to summary judgment pursuant to Fed. R. Civ. P. 56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

as to any material fact and that the moving party is entitled to judgment as a matter of law."

The moving party bears the burden of proof. *Aetna Life Ins. Co. v. Great National Corp.*, 818 F.2d 19, 20 (8th Cir. 1987). When considering a motion for summary judgment, the court must scrutinize the evidence in the light most favorable to the non-moving party, according the non-moving party the benefit of every factual inference and resolving all doubts as to the facts or existence of any material fact against the moving party. *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 179-80 (W.D. Mo. 1985).

Recently, the Supreme Court has redefined the standards to be considered in ruling on summary judgment motions. Where, as in this case, the party moving for summary judgment does not bear the ultimate burden of persuasion at trial that party must make a prima facie showing "that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). This burden is met when the moving party identifies those portions of the record demonstrating an absence of a genuine issue of material fact. *Id.* at 323.

If the moving party meets this requirement, the burden shifts to the non-moving party who must produce sufficient evidence to manifest a dispute as to the material facts. To successfully meet this burden the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the, material facts." *Matsushita*

Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rather, the party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby Inc., 474 U.S. 242, 248 (1986).* Finally, "[i]n assessing whether a material fact is subject to a genuine dispute, a court should employ a standard essentially identical to that governing a motion for directed verdict under Rule 50(a)." Id. at 250. If a rational trier-of-fact, considering the record as a whole, could not find in favor of the non-moving party, then a trial is unnecessary. *Matsushita*, 475 U.S. at 586.

III. ANALYSIS

Defendants attack plaintiffs' claims on two fronts. First, defendants contend that all of plaintiff DeBlase's claims arising out of investments made before 1986 (eight of the ten investments made by DeBlase) are time-barred by Mo. Rev. Stat. § 516.120 (1986) (five year statute of limitations triggered by notice of the alleged fraud). Second, defendants attack the allegation underlying all of plaintiffs' claims, arguing that no fraud or misrepresentation exists as a matter of law.[5] Both of defendants' arguments turn on the issue of notice. The answer to a single question will ultimately decide both prongs of defendants' motion: When were plaintiffs put

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[5] The primary allegation undergirding plaintiffs claims is that the defendants, through DiSette, made material and fraudulent oral representations concerning the degree of risk and stability of the investments made by plaintiffs. All claims are inherently linked to this allegation. Therefore, defendants seek to invalidate all of plaintiffs' claims by challenging this primary allegation.

on notice that the investments were not low-risk, stable investments but were volatile and speculative in nature?[6] Defendants contend that the "offering materials"[7] provided to plaintiffs (prior to, or at the time of, investment) clearly and unequivocally gave plaintiffs notice that the investments were high risk and not stable. Plaintiffs argue that, at a minimum, there is a genuine dispute of fact concerning when they received notice of the investments's risks.

There is no dispute that plaintiffs signed subscription agreements contemporaneously with each investment. Defendants contend that these subscription agreements provided the critical notice to plaintiffs in two respects. First, in most cases the express terms of the agreements themselves stated that the investments were high risk.[8] Second, the

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[6] The answer to this question will resolve the issues presented by both prongs of defendants" motion. The point in time that DeBlase was given notice of the true nature of the investments will mark the beginning of the statute of limitations period. Further, if notice of the high risk nature of the investments preceded, or was contemporaneous with, the investments, plaintiffs' misrepresentation claims must fail as a matter of law.

[7] Defendants define the "offering materials" as written disclosures provided to plaintiffs including an investor questionnaire, a subscription agreement and a private placement memorandum (a document similar to a prospectus, referred to hereafter as a "PPM").

[8] The following subscription agreements (attached as exhibits to Defendants' Suggestions in Support of the Motion for Summary Judgment) signed by DeBlase clearly indicated the high risk associated with the investments:

Exhibit F-1, p. D-3 ¶4(k)(i); Exhibit F-2, p. D-3 ¶4(k)(i);
Exhibit F-3, p. C-3 ¶4(k)(i); Exhibit F-4, p. D-3 ¶4(k)(i);
Exhibit F-5, p. C-3 ¶5(l)(i); Exhibit F-7, p. E-2 ¶3(l)(i);

subscription agreements, in one form or another, provided that plaintiffs had "received and read or reviewed" each PPM (detailing the high risk nature of the investments) accompanying the individual investments. The PPMs leave no doubt as to the high risk, speculative nature of the limited partnership investments.[9] Indeed, the PPMs often began with capitalized, bold-faced warnings such as: THE INVESTMENT INVOLVES A HIGH DEGREE OF RISK. Further, throughout the text of the various PPMs the speculative nature of the investments was clearly and redundantly manifested.

To grant summary judgment in favor of defendants, the court must ultimately find that the only conclusion that a rational trier-of-fact could reach is that plaintiffs had notice of the speculative nature of the investments prior to, or at the

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Exhibit F-9, p. B-5 ¶¶4(j) & 4(l); and Exhibit F-10, p. IV-6 ¶¶8 & 20.

Those signed by Cerra stating the risks involved are:

Exhibit G-1, p. B-5 ¶¶4(j) & 4(l); Exhibit G-2, p. IV-6 ¶¶8 & 20; and Exhibit G-4, p. 3 ¶3(b).

[9] The PPMs associated with the DeBlase investments repeatedly indicated the high risk involved with these investments. See Exhibit F-1, pp. (ii) & 32; Exhibit F-2, pp. (ii) & 30; Exhibit F-3, p. (iii); Exhibit F-4, p. (ii); Exhibit F-5, pp. (iv-v) & 45; Exhibit F-6, pp. (i) & 19; Exhibit F-7, pp. (i) & 26; Exhibit F-8, pp. (i) & 27; Exhibit F-9, pp. v & 45; and Exhibit F-10, cover page and pp. (i) & 49.

The PPMs associated with Cerra's investments also clearly stated the risks involved. See Exhibit G-1, pp. v & 45; Exhibit G-2, cover page and pp. (i) & 49; Exhibit G-3, pp. (i) & 27; Exhibit G-4, pp. (i) & 18; and Exhibit G-5, pp. (ii) & 48-49.

time of, investment (or in the case of DeBlase, beyond the statute of limitations). *See generally Matsushita*, 475 U.S. at 586. The linchpin of defendants, motion is the claim that the signed subscription agreements establish, as a matter of law, that plaintiffs invested money with full notice of the true nature of the investments. With full disclosure to plaintiffs of the risks involved in these investments, defendants argue that plaintiffs' claims of misrepresentation and fraud must fail as a matter of law. The court agrees and will grant the motion for summary judgment accordingly.

Plaintiffs' defense to the motion is that they signed the subscription agreements without reading the offering materials and that DiSette "went to great lengths to conceal material information from the plaintiffs." Plaintiffs' Suggestions in Opposition to the Motion for Summary Judgment, p. 15. That is, DiSette allegedly assured plaintiffs that they did not need to read the offering materials and thereby deceitfully deprived them of the knowledge contained in the written disclosures. "[B]oth plaintiffs have testified that they often time were not even given an opportunity to read the entire document, and [were] simply presented with a stack of documents with post-it notes indicating where they should sign. DeBlase even testified that there were occasions when the only page he received of the multi-page documents was the one which he was to sign." Plaintiffs' Suggestions in Opposition to the Motion for Summary Judgment, p. 14 (emphasis in original). The court rejects plaintiffs' argument.

The subscription agreements and the PPMs unequivocally stated the inherent risk of the investments. Plaintiffs had full knowledge of the existence of all these documents (they signed the subscription agreements and the agreements clearly referenced the PPMS) and simply chose not to review them. There has been no evidence that DiSette refused to produce these documents upon request, prevented plaintiffs from examining these documents or otherwise concealed their existence. Instead, plaintiffs seem to infer that DiSette's alleged assurances that plaintiffs need not review these documents somehow prevented them from examining the documents. The court cannot agree. Knowing that these documents existed, plaintiffs made a conscious choice not to bother themselves with the specific information available to them. Rather, plaintiffs signed the subscription agreements without review and now claim that their reliance on the alleged oral assurances of DiSette should insulate them from the disclosures made in the agreements. This position is untenable.

"Under Missouri law, a person who has an opportunity to read a document but signs it without doing so is held to have knowledge of the document's contents, absent a showing of fraud." *United States of America for the use of Bussen Quarries, Inc. v. Thomas*, 938 F.2d 831, 833 (8th Cir. 1991). Plaintiffs have failed to make any showing that fraud prevented them from understanding what the subscription agreements clearly stated; specifically, that the investments carried a high risk and that plaintiffs had "received and read or reviewed" the PPMS. The *Bussen Quarries* presumption

is not invalidated simply because some kind of alleged fraud exists in the action. Rather, this court understands *Bussen Quarries* to mean that the presumption is valid unless the alleged fraud either created a misapprehension as to the meaning or effect of the signed agreement, or induced plaintiffs to sign. The fraud alleged by plaintiffs does not affect the validity of the signed subscription agreements and therefore plaintiffs are deemed to have full knowledge of the subscription agreements and PPMs.[10]

Further, this court finds the Eighth Circuit's decision in *Davidson v. Wilson*, 973 F.2d 1391 (8th Cir. 1992), dispositive of plaintiffs' argument. In *Davidson*, the court was faced with two investors suing the agent, and the securities company employing the agent, that sold them shares in a high risk limited partnership. *Id.* at 1392. The plaintiffs alleged fraud because the investments did not meet alleged oral representations made by defendants. *Id.* However, the plaintiffs received and signed subscription agreements prior to making the investments. *Id.* at 1399.

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[10] Plaintiffs seem to argue two related manifestations of the alleged fraud: (1) That plaintiffs should rely totally on DiSette without reading the offering materials; and (2) The original statements of DiSette concerning the low-risk nature and stability of the investments. The court finds that plaintiffs have not set forth specific facts showing that DiSette represented that the investments were stable and low risk. However, even assuming that these representations did occur does not allow plaintiff to overcome the Bussen Quarries presumption. Fraud as to the speculative nature of the investments did not prevent DeBlase from understanding the content or effect of the subscription agreements, nor did it fraudulently induce plaintiffs to sign. Further, while DiSette's alleged assurances to plaintiffs may have been poor counsel, it does not rise to the level of fraud. Accordingly, the court finds that plaintiff have failed to show any possible fraud foreclosing the Bussen Quarries presumption.

These agreements made clear the risky nature of the investments and also referenced other documents disclosing the risks involved. *Id.* at 1396-1400.

The district court granted defendants' motion for summary judgment, holding that the plaintiffs "may not justifiably close their eyes to the written materials and rely only upon the oral statements, and that [plaintiffs] accordingly are charged with constructive knowledge of the written materials available to them." Id. at 1398. The Eighth Circuit affirmed, finding that:

> a sophisticated investor, confronted with a written document which contained repeated references to two other documents . . . and that also contained explicit disclaimers . . . did not justifiably rely upon any contradictory oral representations. There was ample reason for [plaintiffs] to take the position, that they would not move ahead and make investment payments until such references and representations were clarified to their satisfaction. Thus, we agree with the district court that, based upon the facts of this case, [plaintiffs'] claimed reliance upon [defendant's] oral representations was unjustifiable as a matter of law.

Id. at 1401.

The factual and legal similarities between this action and *Davidson* compel an identical result. Admittedly, plaintiffs DeBlase and Cerra are not as financially sophisticated as the investors in *Davidson*, but neither are

they unsophisticated.[11] Plaintiff DeBlase is highly educated with significant experience in investing and financial matters. Deposition of Joseph DeBlase, pp. 33-34, 47, 48 56, 64, 66, 68 & 72-73. Plaintiff Cerra has owned and operated two successful construction corporations for a number of years.[12] Deposition of Ben Cerra, p. 10-13. Armed with a reasonable degree of business sophistication, plaintiffs were confronted with subscription agreements containing explicit disclaimers as to risk and/or referencing additional risk disclosing documents. Plaintiffs made a knowing and intelligent waiver of their right to review these materials before investing and relied blindly on the alleged oral representations of DiSette. Given these facts, the court must find that plaintiffs' "claimed reliance upon [defendant's] oral representations was unjustifiable as a matter of law." *Id.* at 1401.[13]

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[11] Plaintiffs have set forth considerable facts in an effort to establish their financial unsophistication. However, the significance of sophistication is muted by the patent and unequivocal risk disclosures in the subscription agreements and PPMS. The court finds that no great degree of sophistication was needed to be aware of the speculative nature of plaintiffs' investments.

[12] Plaintiff Cerra also indicated on one subscription agreement that "I have such knowledge and experience in financial and business matters and in tax-oriented investments in particular that I am capable of evaluating the merits and risks of an investments in the securities." Defendant's Suggestions in Support of the Motion for Summary Judgment, Exhibit G-5, p. A-1--7.

[13] The court in Davidson reviewed the plaintiffs,' claim of justifiable reliance within the analytical framework set forth in Zobrist v. Coal-X, Inc., 708 F.2d 1511 (10th Cir. 1983). In reviewing claims of justifiable reliance, the relevant factors are:

> (1) the sophistication and expertise of the plaintiff in financial and securities matters; (2) the existence of long standing business or personal relationships; (3) access to the relevant information; (4) the existence of a fiduciary relationship; (5) concealment of the fraud; (6) the opportunity to detect the fraud; (7) whether the plaintiff initiated the

IV. CONCLUSION

As a matter of law, plaintiffs cannot justifiably rely on the alleged oral representations of DiSette. Rather, pursuant to the *Bussen Quarries* presumption and the holding in *Davidson v. Wilson*, the plaintiffs had actual (or at a minimum constructive knowledge) of the high risk, speculative nature of the limited partnerships at the time of investment. It follows then that both prongs of defendants' motion for summary judgment are valid. *See supra* note 3 and accompanying text.

As previously stated, all claims stated in plaintiff's Amended Complaint are inherently founded upon an

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stock transaction or sought to expedite the transaction; and (8) the generality or specificity of the misrepresentations.

Davidson, 973 P.2d at 1400 (quoting Zobrist, 708 F.2d at 1516). In addition to finding plaintiffs reasonably sophisticated in financial matters, this court finds the other factors weigh heavily in favor of granting the motion for summary judgment. Most significantly, the court finds that plaintiffs had full access to the relevant information (although they chose to ignore the materials); it cannot reasonably be found that DiSette concealed this information; and plaintiffs had every opportunity to detect the alleged fraud by simply reading the documents they signed and/or represented that they had reviewed. Further, while DeBlase offers some evidence of a personal relationship with DiSette, neither plaintiff sets forth facts establishing a fiduciary relationship. Under Missouri law, a confidential or fiduciary relationship exists where one party, through ignorance (such as ignorance concerning finance and investments), "has become subservient to the dominant will of another, that the property of the subservient person has come into the possession or management of the dominant person, that the subservient person has surrendered his independence, and that there has been manipulation of the actions of the subservient party who has placed has trust and confidence in the dominant person." Neal v. Sparks, 773 S.W.2d 481, 486 (Mo. Ct. App. 1989). No facts offered by plaintiffs would support a finding that they had surrendered their independence to DiSette.

In weighing all of the Zobrist factors applied in Davidson, this court finds that plaintiffs are not, as a matter of law, entitled to the protections of justifiable reliance.

allegation of fraudulent representation concerning the nature of the investments. *See supra* note 2 and accompanying text. Having found that this allegation fails as a matter of law, the court finds that all claims stated in the Amended Complaint must fail. Accordingly, it is ORDERED that defendants' motion for summary judgment as to all of plaintiffs' claims (Counts I through V) is GRANTED.

/s/ Fernando J. Gaitan, Jr.
Fernando J. Gaitan, Jr.
United States District Judge

Dated: May 27, 1993
Kansas City, Missouri

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

AMENDED
JUDGMENT IN A CIVIL CASE

Case No. 91-0642 CV-W-2

DR. JOSEPH C. DEBLASE and,
BEN CERRA,
Plaintiffs,

vs.

CIGNA INDIVIDUAL FINANCIAL
SERVICES, et al.,
Defendants.

____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

____ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

__X__ Decision by Court. This action was briefed by the parties. The issues were reviewed and a decision has been rendered.

IT IS ORDERED that

defendants' motion for summary judgment as to all of plaintiffs' claims (Counts I through V) is GRANTED.

May 27, 1993 — R. F. Connor
Date — Clerk

/s/ Rhonda Ens
(by) Deputy Clerk

Entered on May 28, 1993

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 91-0642-CV-W-2

Dr. Joseph C. DeBlase et al.,
Plaintiffs,

vs.

CIGNA Individual Financial
Services Company et al.,
Defendants.

ORDER

I. INTRODUCTION

Plaintiffs in the above titled action are seeking to recover funds lost in various high risk investments orchestrated by defendant, Nicholas DiSette, who was allegedly acting within his capacity as an employee of the other three defendants (known collectively herein as CIGNA).[1] Plaintiffs claim that they instructed DiSette to provide them with low risk investments and that instead, DiSette proffered high risk investments. Plaintiffs claim that, despite the fact that the offering materials and subscription agreements which accompanied each investment stated that the investments were high risk, they signed the subscription agreements without

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[1]The other named defendants are Cigna Individual Financial Services Company, Cigna Corporation and Cigna Securities.

reading the offering materials and were unaware of the risks because DiSette assured them that there was no need to read them. Plaintiffs' Amended Complaint states five counts: Count One alleges that DiSette, acting as an employee of CIGNA, made fraudulent representations to plaintiffs concerning investments; Count Two alleges that DiSette, acting as an employee of CIGNA, violated his fiduciary duty to plaintiffs; Count Three alleges as an alternative to Counts One and Two, that DiSette, acting as an employee of CIGNA, acted negligently towards plaintiffs; Count Four alleges that CIGNA was negligent in hiring and supervising DiSette; and Count Five alleges that defendants' actions were unlawful under the Missouri Merchandising Practices Act, specifically Mo. Rev. Stat. § 407.020.1 (1986).

On May 27, 1993, this court issued an order granting defendants' motion for summary judgment as to all counts of plaintiffs' complaint. On June 9, 1993, plaintiffs filed a motion for reconsideration of the May 27 Order. On November 17, 1993, the court, upon reconsideration, upheld the May 27 Order granting summary judgment as to Counts I and V but denied summary judgment as to Counts II through IV for lack of specific arguments regarding these claims. The November 17 Order allowed defendants to renew their motion for summary judgment as to Counts II through IV by specifically addressing these claims. Pending before this court is defendants' renewed motion for summary judgment on Counts II through IV of plaintiffs' complaint.

II. STANDARD FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure permits summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

as to any material fact and that the moving party is entitled to judgment as a matter of law."

The key to determining whether summary judgment is proper is ascertaining whether there exists a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists if: (1) there is a dispute of fact; (2) the disputed fact is material to the outcome of the case; and (3) the dispute is genuine, that is, a reasonable jury could return a verdict for either party. The party moving for summary judgment has the burden of proving that these requirements for summary judgment have been met. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

In a summary judgment analysis, a court must first consider whether there are any issues of fact. If the only issues are issues of law, then summary judgment is appropriate. *Sheline v. Dun & Bradstreet*, 948 F.2d 174, 176 (5th Cir. 1991).

If issues of fact are raised, a court must consider whether these issues are material to the outcome of the case. Materiality is identified by the substantive law that is to be applied. *Anderson*, 477 U.S. at 248. Factual disputes that are collateral to the substantive law will not preclude summary judgment. *See Id.*

In addition to the requirement that a dispute of fact be material, the dispute must also be genuine. A dispute of fact is considered genuine if the non-moving party has produced sufficient evidence such that a reasonable jury could return a verdict for that party. *Id.* at 249. When considering a motion for summary judgment, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 255. If the evidence submitted by the non-

moving party is merely colorable or is not significantly probative, then summary judgement may be granted. *Id.* at 249-50.

Where the party moving for summary judgment does not bear the burden of proof at trial, that party must show "that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. at 325. This burden is met when the moving party identifies portions of the record demonstrating an absence of a genuine issue of material fact. *Id.* at 323. If the moving party meets the requirement, the burden shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 474 U.S. at 248. The trial judge then determines whether a trial is needed. "[Wlhether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250.

III. ANALYSIS

A. Count III

Count III of plaintiffs' complaint is a negligence claim against defendant DiSette. Plaintiffs claim that DiSette was negligent in assuring plaintiffs that they need not read the offering materials for the investments that they made and by advising and encouraging plaintiffs to invest in high risk investments after analyzing their net worth and financial needs.

In any action for negligence, the plaintiff must establish that (1) the defendant had a duty to the plaintiff, (2) the defendant failed to perform that duty, and (3) the defendant's breach was the proximate cause of the plaintiff's injury. *Martin v. City of Wash.*, 848 S.W.2d 487, 493 (Mo. 1993) (en

banc). In this case, the court finds that plaintiffs have failed to prove that DiSette breached a duty owed to them.

The relationship between DiSette and the plaintiffs was a financial advisor/investor relationship. In this relationship, the plaintiffs had discretion over their investments, that is DiSette was not authorized to engage in investments without plaintiffs' approval. The Missouri Court or Appeals discussed the duties owed by a financial advisor to his investors in a non-discretionary account in *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746 (Mo. App. 1990). In *Vogel*, the court found that these duties are somewhat limited and include the duties to: (1) study a stock before recommending it; (2) inform the customer of the risks involved in the particular transaction; (3) refrain from self dealing and misrepresentation; (4) follow the customer's order; and (5) disclose any personal interest in the transaction. *Id.* at 752.

Plaintiffs in this case have failed to prove that any of these duties have been breached. Plaintiffs have presented no evidence that DiSette failed to study the investments before recommending them, was self dealing, failed to follow their orders, or that he had any personal interest in the transactions.

While plaintiffs contend that DiSette failed to inform them of the risks involved in the particular transaction, this court has previously found that most of the subscription agreements signed by plaintiffs for each investment stated that the investments were high risk. Furthermore, each subscription agreement stated that plaintiffs had "received and read or reviewed" each PPM (detailing the high risk nature of the investments) accompanying the individual investments. Under Missouri law, the plaintiffs are deemed to have full knowledge of any documents they signed. *United States for the use of Bussen Quarries, Inc. v. Thomas*, 938 F.2d 831, 833 (8th Cir. 1991). Therefore, this court found that

plaintiffs were held to have knowledge of the high risk investments. (Order of Nov. 17, 1993, at 10.) This court also found that plaintiffs' reliance on oral representations made by DiSette was unjustifiable as a matter of law. (Order of November 17, 1993, at 12 (citing *Davidson v. Wilson*, 973 P.2d 1391, 1401 (8th Cir. 1992).) Consequently, plaintiffs cannot claim that DiSette failed to inform them of the risks involved in the transaction.

Plaintiffs also cannot prove that any misrepresentation occurred. Under the theories of negligent and intentional misrepresentation, a plaintiff must prove reliance. *See Frame v. Boatmen's Bank*, 782 S.W.2d 117, 121 (Mo. Ct. App. 1989) (stating the elements for negligent misrepresentation); *Marler v. House*, 637 S.W.2d 365, 367 (Mo. Ct. App. 1982) (stating the elements for intentional misrepresentation). As discussed previously, this court has found as a matter of law that plaintiffs could not justifiably rely on alleged oral statements made by defendant DiSette. Therefore, plaintiffs cannot prove the necessary elements for misrepresentation.

The court finds that plaintiffs are unable to show that DiSette breached any duty owed to them according to Missouri law. Plaintiffs claim that DiSette breached his duty by advising and encouraging plaintiffs to invest in high risk investments after analyzing their net worth and financial needs. Thus, plaintiffs appear to allege that DiSette owed them a duty to provide prudent investment advice. The Missouri Court of Appeals, however, has found that a broker must "manage the account in a manner directly comporting with the needs and objectives of the customer" only when the account is a discretionary one, that is when the broker has the authority to enter into investments without the approval of the investor. *Vogel*, 801 S.W.2d at 752. In this case, the accounts were non-discretionary. Plaintiffs had the ultimate decision of whether or not to proceed with the investments.

Plaintiffs may not impose a greater duty on DiSette than exists under Missouri law. Because plaintiffs cannot show that DiSette breached a duty owed to them under a non-discretionary account, the claim of negligence under Count III must fail and defendants" motion for summary judgment on this count is granted.

B. Count II

Count II of plaintiffs' complaint is a claim for breach of fiduciary duty. The fiduciary duties owed by defendant DiSette to plaintiffs are set forth in the *Vogel* case which was discussed in the analysis of Count III of plaintiffs' complaint. The discussion of Count III found that plaintiffs have failed to show that DiSette breached any of these duties. Consequently, defendants' motion for summary judgment on Count II is granted.

C. Count IV

Count IV alleges that CIGNA was negligent in hiring and supervising DiSette and is derivative of claims against DiSette. Because this court has granted defendants' motion for summary judgment on all counts alleged directly against DiSette, Count IV cannot survive. Therefore, defendants' motion for summary judgment on Count IV is also granted.

Accordingly, it is ORDERED that defendants' renewed motion for summary judgment is GRANTED.

/s/ Fernando J. Gaitan, Jr.
Fernando J. Gaitan, Jr.
United States District Judge

Dated: March 29, 1994
Kansas City, Missouri

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 91-0642-CV-W-2

DR. JOSEPH C. DEBLASE, at al.,
Plaintiff(s),

v.

CIGNA INDIVIDUAL FINANCIAL
SERVICES COMPANY, et al.,
Defendant(s).

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came before the Court. The issues have been determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to the court's order dated 11/17/93, defendants' motion for summary judgment is GRANTED in part and DENIED in part. This order amended and superseded the court's order of 5/27/93;

that pursuant to the court's order of 3/29/94, defendant's renewed motion for summary judgment is GRANTED.

March 29, 1994 R. F. Connor
Date Clerk

/s/ Rhonda Ens
(by) Deputy Clerk

Entered on Mar 29, 1994

Supreme Court, U.S.
FILED
MAY 5 1995
OFFICE OF THE CLERK

No. 94-1746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DR. JOSEPH C. DEBLASE and BEN CERRA,

Petitioners,

v.

CIGNA INDIVIDUAL FINANCIAL SERVICES COMPANY, CIGNA CORPORATION, CIGNA SECURITIES, INC., NICHOLAS DISETTE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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**Counsel of Record*

QUESTIONS PRESENTED

1. Whether this Court should grant *certiorari* in this diversity action to review a decision of the United States Court of Appeals for the Eighth Circuit, affirming the District Court's grant of summary judgment for respondents on petitioners' Missouri common law and statutory claims which was based upon established principles of Missouri law.

2. Whether the Court of Appeals erred in affirming summary judgment for respondents on petitioners' state law claims where the petitioners claim that they believed they were purchasing safe and conservative investments, but the undisputed facts establish that the purchase agreements which petitioners signed, and the offering memoranda which petitioners acknowledged they received, disclosed that the investments were speculative and high-risk.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to this case in the United States Court of Appeals for the Eighth Circuit, *DeBlase v. CIGNA Individual Financial Services Co.*, No. 94-2250WMKC, were Joseph C. DeBlase and Ben Cerra, as plaintiffs-appellants, and CIGNA Individual Financial Services Co. ("CIFSCO"), CIGNA Securities, Inc. ("CSI"), and Nicholas DiSette, as defendants-appellees. Although named as a defendant in the action below, CIGNA Corporation was never served with a copy of the Amended Complaint and took no part in the proceedings. Accordingly, CIGNA Corporation is not a proper respondent to the petition.

RULE 29.1 LISTING

Subsequent to the filing of this litigation, CSI and CIFSCO merged to form CIGNA Financial Advisors, Inc., a wholly-owned subsidiary of Connecticut General Corporation, whose ultimate corporate parent is CIGNA Corporation.

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No. 94-1746

In The
Supreme Court of the United States
October Term, 1994

DR. JOSEPH C. DEBLASE and BEN CERRA,

Petitioners,

v.

CIGNA INDIVIDUAL FINANCIAL SERVICES COMPANY, CIGNA CORPORATION, CIGNA SECURITIES, INC., NICHOLAS DISETTE,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The decisions of the United States Court of Appeals for the Eighth Circuit and the United States District Court for the Western District of Missouri are not reported. Copies of these decisions are attached to the petition as Appendices A through F.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

Relevant Missouri statutory and constitutional provisions are set forth in Appendix E hereto.

STATEMENT OF THE CASE

In 1985-86, petitioners Joseph C. DeBlase and Ben Cerra (plaintiffs below) purchased interests in several tax-advantaged real estate and equipment leasing limited partnerships through respondent CSI. It is undisputed that prior to each purchase petitioners signed subscription agreements which plainly advised them that the partnership interests they were buying were "speculative," "high risk" investments whose financial benefits and ultimate success were inherently uncertain. In those same agreements, petitioners acknowledged in writing that they understood "the investments carried a high risk" and, further, that they had "received and read or reviewed" the private placement memoranda ("PPMs") for the investments. (Pet. App. C, A-11.)[1/] The PPMs contained exhaustive warnings and disclosures about the risks associated with the investments. For example, the PPMs "often began with capitalized, bold-faced warnings such as: **THE INVESTMENT INVOLVES A HIGH DEGREE OF RISK**." (*Id.* at A-9.) Thus, the documents that petitioners signed and acknowledged they received "unequivocally stated the inherent risk of the investments." (*Id.* at A-11.)

[1/] "Pet. App." refers to the appendix to the petition. "App." refers to the appendix to the brief in opposition to the petition. "Pet." refers to the petition for a writ of *certiorari*.

In 1991, following a decline in real estate markets nationwide, petitioners sued respondents in Missouri state court, asserting claims for common law fraud, breach of fiduciary duty, negligence, negligent supervision, and violation of the Missouri Merchandising Practices Act, R.S. Mo. § 407.020 *et seq.* Each claim was premised upon the allegation that respondents failed to disclose the risks inherent in petitioners' investments. Respondents removed the action to the United States District Court for the Western District of Missouri pursuant to 28 U.S.C. § 1332.

After full discovery, respondents moved for summary judgment on all five counts. On May 25, 1993, the District Court granted respondents' motion, holding that petitioners' claims failed as a matter of clearly established Missouri law because petitioners "had notice of the speculative nature of the investments" by virtue of the written risk disclosures in their signed subscription agreements and in the PPMs. (App. A-5.) As the District Court held, because petitioners signed documents disclosing the risks of their investments and acknowledging that they had received the PPMs, under Missouri law, they were bound by their signed acknowledgements. (*Id.* at A-6.) On May 27, 1993, the District Court issued an Amended Order which specified that judgment was entered for respondents on all claims. (Pet. App. C, A-15 to A-16.)

Following petitioners' motion for reconsideration, the District Court issued a Second Amended Order on November 17, 1993. The District Court affirmed the prior entry of summary judgment on petitioners' common law and statutory fraud claims, but vacated the entry of summary judgment on petitioners' negligence and breach of fiduciary duty claims. (App. B-1.) However, the court invited respondents to renew their motion with respect to those claims. (*Id.*)

Respondents filed a Renewed Motion for Summary Judgment, which addressed the claims for negligence and breach of fiduciary duty. On March 29, 1994, the District Court entered summary judgment for respondents on those claims. (Pet. App. E.) The Court held that petitioners' negligence claims rested upon

alleged oral misrepresentations and, in the face of the comprehensive written disclosures petitioners acknowledged they had received, petitioners could not establish justifiable reliance upon those misrepresentations. (*Id.* at A-24.) With respect to the breach of fiduciary duty claim, the Court held that petitioners had failed to show that respondents breached any duty owed to them under Missouri law. (*Id.* at A-23, A-25.) Petitioners' motion for reconsideration was denied by the District Court on April 21, 1994. (App. C.)

Petitioners appealed the District Court's orders granting summary judgment to the United States Court of Appeals for the Eighth Circuit. On November 22, 1994, the Court of Appeals affirmed the District Court. (Pet. App. A.) Petitioners filed a petition for rehearing and suggestion of rehearing *en banc*, which was denied on January 19, 1995. (Pet. App. B.) This petition followed.

REASONS FOR DENYING THE WRIT

This Court will grant a writ of certiorari "only when there are special and important reasons therefor." Sup. Ct. Rule 10. Petitioners offer essentially two purported grounds for review, neither of which warrant consideration by this Court. *First*, petitioners claim that the Eighth Circuit should have deferred its ruling to await a decision by the Missouri Supreme Court in a case which the Missouri Supreme Court dismissed before decision. *Second*, petitioners claim that the District Court and the Eighth Circuit erred in granting and affirming summary judgment for respondents. Neither of these grounds presents a "special and important" issue worthy of this Court's attention. Petitioners' first argument is moot. As to petitioners' second argument, the purported errors of which petitioners complain involve purely state law issues not appropriate for *certiorari* review and, in any event, were correctly decided under established principles of Missouri law. Accordingly, the petition for a writ of *certiorari* should be denied.

I.

PETITIONERS' RELIANCE ON THE MISSOURI STATE COURT CASE OF *COCHRAN v. GIDDENS* IS MISPLACED BECAUSE THAT CASE HAS BEEN DISMISSED WITHOUT OPINION.

Petitioners rely on a memorandum opinion issued by the Missouri Court of Appeals in *Cochran v. Giddens*, 1994 WL 160351 (Mo. App. May 3, 1994). According to petitioners, the decisions granting and affirming summary judgment for respondents in this case conflict with the *Cochran* "decision." (Pet. 11.) Petitioners further contend that because the Missouri Court of Appeals transferred the *Cochran* case to the Missouri Supreme Court for decision, the Eighth Circuit was required to stay its ruling pending that decision. Petitioners are wrong.

The Missouri Court of Appeals never decided *Cochran v. Giddens*. That court only issued a memorandum opinion indicating how it "would" have decided the case, and instead transferred the case to the Missouri Supreme Court for ultimate decision. 1994 WL 100351 at *4.[2/] The Missouri Supreme Court dismissed the case on March 29, 1995 without issuing an opinion. (App. D.)

Even if the Missouri Court of Appeals had actually decided the case, its opinion was vacated when the matter was transferred to the Missouri Supreme Court. *See State v. Norman*, 380 S.W.2d 406, 407 (Mo. *en banc* 1964) ("By reason of the order transferring the cause to this Court, the opinion and decision of the St. Louis Court of Appeals was necessarily vacated and set aside and may be referred to as functus officio"). *See also* Mo. Const. Art. V, Sec. 10 ("The supreme court may finally determine all causes coming to it from the court of appeals, . . . the same as an

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[2/] The Court of Appeals' memorandum in *Cochran*, which was fully discussed in both petitioners' and respondents' briefs filed in the Eighth Circuit, raised an entirely different issue than that raised here. It was concerned only with the question of when plaintiffs had notice of an alleged fraud for purposes of applying the Missouri statute of limitations; it did not address the issue of reliance.

original appeal"); Mo. S. Ct. Rule 83.09 (same); *Philmon v. Baum*, 865 S.W.2d 771, 774 (Mo. App. 1993); *Carroll v. Loy-Lange Box Co.*, 829 S.W.2d 86, 90 (Mo. App. 1992). Thus, even if the Missouri Court of Appeals had decided *Cochran*, that court's opinion was vacated and "of no precedential effect." *Carroll*, 829 S.W.2d at 90.

Accordingly, there is no state court opinion in *Cochran*, and neither the orders of the District Court nor the *per curiam* opinion of the Eighth Circuit conflicts with any Missouri state court decision. Petitioner's reliance on *Cochran* is thus misplaced and provides no basis for review by this Court.[3/]

II.

PETITIONERS' CONTENTION THAT THE COURT OF APPEALS ERRED IN AFFIRMING SUMMARY JUDGMENT FOR RESPONDENTS DOES NOT MERIT THIS COURT'S REVIEW.

Petitioners' remaining arguments are, in effect, a litany of complaints that the District Court and the Court of Appeals erred when they granted and affirmed summary judgment for respondents. Specifically, petitioners complain that the lower courts erred in deciding that petitioners were bound by the risk disclosures in their signed subscription agreements and by their written acknowledgements that they had received and reviewed the PPMs, and thereby had knowledge of the high risk nature of the investments. (Pet. 9-15.) Petitioners also complain that the lower courts erred in ruling that petitioners failed to show that respondents

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[3/] Pursuant to Supreme Court Rule 15.1, respondents advise the Court that petitioners' discussion of the status and legal effect of *Cochran v. Giddens* is inaccurate. The true status and effect of the *Cochran* case is as set forth above. In addition, the petition contains numerous other misstatements of fact and law. Because those misstatements do not alter the conclusion that petitioners do not and cannot establish a basis for review by this Court, respondents have not identified each individual misstatement, but instead have accurately set forth the dispositive, undisputed facts and the applicable law in this brief in opposition.

breached any of the limited duties owed to petitioners. (Pet. 16-22.)

Mere error by the court below normally does not provide a sufficient basis for granting a petition for writ of *certiorari*. *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review"). The petition presents no issue of federal law, no conflict among the circuits, nor any other question whose resolution by this Court would provide needed guidance to courts throughout the nation. The purported errors described by petitioners are of consequence to no one but petitioners. Therefore, they do not merit this Court's attention.

In any event, there was no error. All of petitioners' arguments received full consideration by the courts below, which correctly decided that summary judgment was appropriate for respondents. Under Missouri law, petitioners are charged as a matter of law with knowledge of the contents of documents that they signed. *See Mercantile Trust Co. v. Carp*, 648 S.W.2d 920, 924 (Mo. App. 1983) (person who signs a document is bound by its contents, whether he reads it or not); *United States use of Bussen Quarries, Inc. v. Thomas*, 938 F.2d 831, 833 (8th Cir. 1991) (same). Here, petitioners signed subscription agreements "that clearly indicated the high risk associated with the investments" (Pet. App. C, at A-8 n.8), and therefore had knowledge of the risks involved in the investments before they made their investments. Because petitioners knew the risks, they could not justifiably rely on any alleged contrary oral statements by respondents. *Davidson v. Wilson*, 973 F.2d 1391, 1401 (8th Cir. 1992) (affirming summary judgment for defendant because plaintiffs "may not

justifiably close their eyes to the written materials and rely only upon the oral statements").[4/] Consequently, all of petitioners' claims based upon allegations of fraud or negligence were correctly dismissed.

For the same reasons, petitioners failed to show that respondents breached any duty owed to petitioners under Missouri law. Missouri imposes, at most, only limited duties on brokers who lack discretionary authority over a client's investments. *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746, 752 (Mo. App. 1990). Because the written offering and subscription materials fully disclosed all of the information petitioners claimed was concealed, the District Court correctly held that petitioners could not show that respondents breached any of the duties imposed by *Vogel*, and therefore could not establish claims for breach of fiduciary duty or negligence.

Because petitioners present no "special and important" basis for granting *certiorari*, the petition should be denied.

[4/] The federal courts of appeals that have addressed these issues uniformly have concluded that investors are bound by written risk disclosures contained in offering materials. *See, e.g., Kennedy v. Josephthal & Co.*, 814 F.2d 798, 802-03 (1st Cir. 1987); *Brown v. E.F. Hutton Group*, 991 F.2d 1020, 1033 (2d Cir. 1993); *Foremost Guaranty Corp. v. Meritor Savings Bank*, 910 F.2d 118, 126 (4th Cir. 1990); *Platsis v. E.F. Hutton & Co.*, 829 F.2d 13 (6th Cir. 1987), *cert. denied*, 485 U.S. 962 (1988); *Acme Propane, Inc. v. Tenexco, Inc.*, 844 F.2d 1317, 1322 (7th Cir. 1988); *McGonigle v. Combs*, 968 F.2d 810, 816-17 (9th Cir.), *cert. dism.*, 113 S. Ct. 399 (1992); *Zobrist v. Coal-X, Inc.*, 708 F.2d 1511, 1518 (10th Cir. 1983).

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Dr. Joseph C. DeBlase and Ben Cerra,	)	
Plaintiffs,	)	
vs.	)	No. 91-0642-CV-W-2
Cigna Individual Financial Services, *et al.*,	)	
Defendants.	)	

ORDER

I. Introduction

Pending before the court is defendants' motion for summary judgment. Plaintiffs are seeking to recover funds lost in various investments orchestrated by defendant, DiSette, who was allegedly acting within his capacity as an employee of the other three defendants (known collectively herein as Cigna).[1/] Plaintiffs filed this action in state court and defendants subsequently removed to federal court. On January 29, 1993, plaintiffs filed an Amended Complaint which states five counts: Count One alleges that DiSette, acting as an employee of Cigna, made fraudulent representations to plaintiffs concerning investments; Count Two alleges that DiSette, acting as an employee of Cigna, violated his fiduciary duty to plaintiffs; Count Three alleges as an alternative to Counts One and Two, that DiSette, acting as an employee of Cigna, acted negligently towards plaintiffs; Count Four alleges that Cigna was negligent in hiring and supervising DiSette; and Count Five alleges

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[1/] The other named defendants are Cigna Individual Financial Services Company, Cigna Corporation and Cigna Securities.

that defendants' actions were unlawful under the Missouri Merchandising Practices Act, specifically Mo. Rev. Stat. § 407.020.1 (1986). Plaintiff also seeks punitive damages in Counts One, Two and Five.

Defendants move for summary judgment arguing that: (1) Plaintiff DeBlase's action is precluded (for the most part) by the controlling statute of limitations; and (2) Written disclosures to the plaintiffs negate all claims flowing from alleged oral representations made by DiSette to plaintiffs.

II. Standards Governing Summary Judgment

A movant is entitled to summary judgment pursuant to Fed. R. Civ. P. 56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The moving party bears the burden of proof. *Aetna Life Ins. Co. v. Great National Corp.*, 818 F.2d 19, 20 (8th Cir. 1987). When considering a motion for summary judgment, the court must scrutinize the evidence in the light most favorable to the non-moving party, according the non-moving party the benefit of every factual inference and resolving all doubts as to the facts or existence of any material fact against the moving party. *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 179-80 (W.D. Mo. 1985).

Recently, the Supreme Court has redefined the standards to be considered in ruling on summary judgment motions. Where, as in this case, the party moving for summary judgment does not bear the ultimate burden of persuasion at trial that party must take a prima facie showing "that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). This burden is met when the moving party identifies those portions of the record demonstrating an absence of a genuine issue of material fact. *Id.* at 323.

If the moving party meets this requirement, the burden shifts to the non-moving party who must produce sufficient evidence to manifest a dispute as to the material facts. To successfully meet this burden the party opposing summary judgment "must do more

than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 474 U.S. 242, 248 (1986). Finally, "[i]n assessing whether a material fact is subject to a genuine dispute, a court should employ a standard essentially identical to that governing a motion for directed verdict under Rule 50(a)." *Id.* at 250. If a rational trier-of-fact, considering the record as a whole, could not find in favor of the non-moving party, then a trial is unnecessary. *Matsushita*, 475 U.S. at 586.

III. Analysis

Defendants attack plaintiffs' claims on two fronts. First, defendants contend that all of plaintiff DeBlase's claims arising out of investments made before 1986 (eight of the ten investments made by DeBlase) are time-barred by Mo. Rev. Stat. § 516.120 (1986) (five year statute of limitations triggered by notice of alleged fraud). Second, defendants attack the allegation underlying all of the plaintiffs' claims arguing that no fraud or misrepresentation exists as a matter of law.[2/] Both of defendants' arguments turn on the issue of notice. The answer to a single question will ultimately decide both prongs of defendants' motion: When were plaintiffs put on notice that the investments were not low-risk, stable investments but were volatile and speculative in nature?[3/]

[2/] The primary allegation undergirding plaintiffs' claims is that the defendants, through DiSette, made material and fraudulent oral representations concerning the degree of risk and stability of the investments made by plaintiffs. All claims are inherently linked to this allegation. Therefore, defendants seek to invalidate all of plaintiffs' claims by challenging this primary allegation.

[3/] The answer to this question will resolve the issues presented by both prongs of defendants' motion. The point in time that DeBlase was given notice of the true nature of the investments will mark the beginning of the statute of limitations period. Further, if notice of the high risk nature of the investments preceded, or was contemporaneous with, the investments, plaintiffs' misrepresentation claims must fail as a matter of law.

Defendants contend that the "offering materials"[4] provided to plaintiffs (prior to, or at the time of, investment) clearly and unequivocally gave plaintiffs notice that the investments were high risk and not stable. Plaintiffs argue that, at a minimum, there is a genuine dispute of fact concerning when they received notice of the investment's risks.

There is no dispute that plaintiffs signed subscription agreements contemporaneously with each investment. Defendants contend that these subscription agreements provided the critical notice to plaintiffs in two respects. First, in most cases the express terms of the agreements themselves stated that the investments were high risk.[5] Second, the subscription agreements, in one form or another, provided that plaintiffs had "received and read or reviewed" each PPM (detailing the high risk nature of the investments) accompanying the individual investments. The PPMs leave no doubt as to the high risk, speculative nature of the limited partnership investments.[6] Indeed, the PPMs often began with capitalized, bold-faced warnings such as: THE INVESTMENT INVOLVES A HIGH DEGREE OF RISK. Further, throughout the

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[4] Defendants define the "offering materials" as written disclosures provided to plaintiffs including an investor questionnaire, a subscription agreement and a private placement memorandum (a document similar to a prospectus, referred to hereafter as a "PPM").

[5] The following subscription agreements (attached as exhibits to Defendants' Suggestions in Support of the Motion for Summary Judgment) signed by DeBlase clearly indicated the high risk associated with the investments: Exhibit F-1, p. D-3 ¶ 4(k)(i); Exhibit F-2, p. D-3 ¶ 4(k)(i); Exhibit F-3, p. C-3 ¶ 4(k)(i); Exhibit F-4, p. D-3 ¶ 4(k)(i); Exhibit F-5, p. C-3 ¶ 5(l)(i); Exhibit F-7, p. E-2 ¶ 3(l)(i); Exhibit F-9, p. B-5 ¶¶ 4(j) & 4(l); and Exhibit F-10, p. IV-6 ¶¶ 8 & 20. Those signed by Cerra stating the risks involved are: Exhibit G-1, p. B-5 ¶¶ 4(j) & 4(l); Exhibit G-2, p. IV-6 ¶¶ 8 & 20; and Exhibit G-4, p. 3 ¶ 3(b).

[6] The PPMs associated with the DeBlase investments repeatedly indicated the high risk involved with these investments. *See* Exhibit F-1, pp. (ii) & 32; Exhibit F-2, pp. (ii) & 30; Exhibit F-3, p. (iii); Exhibit F-4, p. (ii); Exhibit F-5, pp. (iv-v) & 45; Exhibit F-6, pp. (i) & 19; Exhibit F-7, pp. (i) & 26; Exhibit F-8, pp. (i) & 27; Exhibit F-9, pp. v & 45; and Exhibit F-10, cover page and pp. (i) & 49. The PPMs associated with Cerra's investments also clearly stated the risks involved. *See* Exhibit G-1, pp. v & 45; Exhibit G-2, cover page and pp. (i) & 49; Exhibit G-3, pp. (i) & 27; Exhibit G-4, pp. (i) & 18; and Exhibit G-5, pp. (ii) & 48-49.

text of the various PPMs the speculative nature of the investments was clearly and redundantly manifested.

To grant summary judgment in favor of defendants, the court must ultimately find that the *only* conclusion that a rational trier-of-fact could reach is that plaintiffs had notice of the speculative nature of the investments prior to, or at the time of, investment (or in the case of DeBlase, beyond the statute of limitations). *See generally Matsushita*, 475 U.S. at 586. The linchpin of defendants' motion is the claim that the signed subscription agreements establish, as a matter of law, that plaintiffs invested money with full notice of the true nature of the investments. With full disclosure to plaintiffs of the risks involved in these investments, defendants argue that plaintiffs' claims of misrepresentation and fraud must fail as a matter of law. The court agrees and will grant the motion for summary judgment accordingly.

Plaintiffs' defense to the motion is that they signed the subscription agreements without reading the offering materials and that DiSette "went to great lengths to conceal material information from the plaintiffs." Plaintiffs' Suggestions in Opposition to the Motion for Summary Judgment, p. 15. That is, DiSette allegedly assured plaintiffs that they did not need to read the offering materials and thereby deceitfully deprived them of the knowledge contained in the written disclosures. "[B]oth plaintiffs have testified that they often time were not even given an opportunity to read the entire document, and [were] simply presented with a stack of documents with post-it notes indicating where they should sign. DeBlase even testified that there were occasions when the *only* page he received of the multi-page documents was the one which he was to sign." Plaintiffs' Suggestions in Opposition to the Motion for Summary Judgment, p. 14 (emphasis in original). The court rejects plaintiffs' argument.

The subscription agreements and the PPMs unequivocally stated the inherent risk of the investments. Plaintiffs had full knowledge of the existence of all these documents (they signed the subscription agreements and the agreements clearly referenced the PPMs) and simply chose not to review them. There has been no evidence that DiSette refused to produce these documents upon request, prevented plaintiffs from examining these documents or

otherwise concealed their existence. Instead, plaintiffs seem to infer that DiSette's alleged assurances that plaintiffs need not review these documents somehow prevented them from examining the documents. The court cannot agree. Knowing that these documents existed, plaintiffs made a conscious choice not to bother themselves with the specific information available to them. Rather, plaintiffs signed the subscription agreements without review and now claim that their reliance on the alleged oral assurances of DiSette should insulate them from the disclosures made in the agreements. This position is untenable.

"Under Missouri law, a person who has an opportunity to read a document but signs it without doing so is held to have knowledge of the document's contents, absent a showing of fraud." *United States of America for the use of Bussen Quarries, Inc. v. Thomas*, 938 F.2d 831, 833 (8th Cir. 1991). Plaintiffs have failed to make any showing that fraud prevented them from understanding what the subscription agreements clearly stated; specifically, that the investments carried a high risk and that plaintiffs had "received and read or reviewed" the PPMs. The *Bussen Quarries* presumption is not invalidated simply because some kind of alleged fraud either created a misapprehension as to the meaning or effect of the signed agreement, or induced plaintiffs to sign. The fraud alleged by plaintiffs does not affect the validity of the signed subscription agreements and therefore plaintiffs are deemed to have full knowledge of the subscription agreements and PPMs.[2/]

Further, this court finds the Eighth Circuit's decision in *Davidson v. Wilson*, 973 F.2d 1391 (8th Cir. 1992), dispositive of

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[2/] Plaintiffs seem to argue two related manifestations of the alleged fraud: (1) That plaintiffs should rely totally on DiSette without reading the offering materials; and (2) The original statements of DiSette concerning the low-risk nature and stability of the investments. The court finds that plaintiffs have not set forth specific facts showing that DiSette represented that the investments were stable and low risk. However, even assuming that these representations did occur does not allow plaintiff to overcome the *Bussen Quarries* presumption. Fraud as to the speculative nature of the investments did not prevent DeBlase from understanding the content or effect of the subscription agreements, nor did it fraudulently induce plaintiffs to sign. Further, while DiSette's alleged assurances to plaintiffs may have been poor counsel, it does not rise to the level of fraud. Accordingly, the court finds that plaintiff have failed to show any possible fraud foreclosing the *Bussen Quarries* presumption.

plaintiffs' argument. In *Davidson*, the court was faced with two investors suing the agent, and the securities company employing the agent, that sold them shares in a high risk limited partnership. *Id.* at 1392. The plaintiffs alleged fraud because the investments did not meet alleged oral representations made by defendants. *Id.* However, the plaintiffs received and signed subscription agreements prior to making the investments. *Id.* at 1399. These agreements made clear the risky nature of the investments and also referenced other documents disclosing the risks involved. *Id.* at 1396-1400.

The district court granted defendants' motion for summary judgment, holding that the plaintiffs "may not justifiably close their eyes to the written materials and rely only upon the oral statements, and that [plaintiffs] accordingly are charged with constructive knowledge of the written materials available to them." *Id.* at 1398. The Eighth Circuit affirmed, finding that:

> a sophisticated investor, confronted with a written document which contained repeated references to two other documents . . . and that also contained explicit disclaimers . . . did not justifiably rely upon any contradictory oral representations. There was ample reason for [plaintiffs] to take the position, that they would not move ahead and make investment payments until such references and representations were clarified to their satisfaction. Thus, we agree with the district court that, based upon the facts of this case, [plaintiffs'] claimed reliance upon [defendant's] oral representations was unjustifiable as a matter of law.

Id. at 1401.

The factual and legal similarities between this action and *Davidson* compel an identical result. Admittedly, plaintiffs DeBlase and Cerra are not as financially sophisticated as the investors in *Davidson*, but neither are they unsophisticated.[8/] Plaintiff DeBlase is highly educated with significant experience in investing and

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[8/] Plaintiffs have set forth considerable facts in an effort to establish their financial unsophistication. However, the significance of sophistication is muted by the patent and unequivocal risk disclosures in the subscription agreements and PPMs. The court finds that no great degree of sophistication was needed to be aware of the speculative nature of plaintiffs' investments.

financial matters. Deposition of Joseph DeBlase, pp. 33-34, 47, 48, 56, 64, 66, 68 & 72-73. Plaintiff Cerra has owned and operated two successful construction corporations for a number of years.[9/] Deposition of Ben Cerra, p. 10-13. Armed with a reasonable degree of business sophistication, plaintiffs were confronted with subscription agreements containing explicit disclaimers as to risk and/or referencing additional risk-disclosing documents. Plaintiffs made a knowing and intelligent waiver of their right to review these materials before investing and relied blindly on the alleged oral representations of DiSette. Given these facts, the court must find that plaintiffs' "claimed reliance upon [defendant's] oral representations was unjustifiable as a matter of law." *Id.* at 1401.[10/]

[9/] Plaintiff Cerra also indicated on one subscription agreement that "I have such knowledge and experience in financial and business matters and in tax-oriented investments in particular that I am capable of evaluating the merits and risks of an investments in the securities." Defendants' Suggestions in Support of the Motion for Summary Judgment, Exhibit G-5, p. A-1-7.

[10/] The court in *Davidson* reviewed the plaintiffs' claim of justifiable reliance within the analytical framework set forth in *Zobrist v. Coal-X, Inc.*, 708 F.2d 1511 (10th Cir. 1983). In reviewing claims of justifiable reliance, the relevant factors are:

> (1) the sophistication and expertise of the plaintiff in financial and securities matters; (2) the existence of long standing business or personal relationships; (3) access to the relevant information; (4) the existence of a fiduciary relationship; (5) concealment of the fraud; (6) the opportunity to detect the fraud; (7) whether the plaintiff initiated the stock transaction or sought to expedite the transaction; and (8) the generality or specificity of the misrepresentations.

Davidson, 973 F.2d at 1400 (quoting *Zobrist*, 708 F.2d at 1516). In addition to finding plaintiffs reasonably sophisticated in financial matters, this court finds the other factors weigh heavily in favor of granting the motion for summary judgment. Most significantly, the court finds that plaintiffs had full access to the relevant information (although they chose to ignore the materials); it cannot reasonably be found that DiSette concealed this information; and plaintiffs had every opportunity to detect the alleged fraud by simply reading the documents they signed and/or represented that they had reviewed. Further, while DeBlase offers some evidence of a personal relationship with DiSette, neither plaintiff sets forth facts establishing a fiduciary relationship. Under Missouri law, a confidential or fiduciary

(continued...)

IV. Conclusion

As a matter of law, plaintiffs cannot justifiably rely on the alleged oral representations of Disette. Rather, pursuant to the *Bussen Quarries* presumption and the holding in *Davidson v. Wilson*, the plaintiffs had actual (or at a minimum constructive knowledge) of the high risk, speculative nature of the limited partnerships at the time of investment. It follows then that both prongs of defendants' motion for summary judgment are valid. *See supra* note 3 & accompanying text. Accordingly, it is ORDERED that defendants' motion for summary judgment is GRANTED.

Fernando J. Gaitan, Jr.
United States District Judge

Dated: May 25, 1993
Kansas City, Missouri

10/ (...continued)
relationship exists where one party, through ignorance (such as ignorance concerning finance and investments), "has become subservient to the dominant will of another, that the property of the subservient person has come into the possession or management of the dominant person, that the subservient person has surrendered his independence, and that there has been manipulation of the actions of the subservient party who has placed has trust and confidence in the dominant person." *Neal v. Sparks*, 773 S.W.2d 481, 486 (Mo. Ct. App. 1989). No facts offered by plaintiffs would support a finding that they had surrendered their independence to DiSette.

In weighing all of the *Zobrist* factors applied in *Davidson*, this court finds that plaintiffs are not, as a matter of law, entitled to the protections of justifiable reliance.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Dr. Joseph C. DeBlase and Ben Cerra,	)	
Plaintiffs,	)	
vs.	)	No. 91-0642-CV-W-2
Cigna Individual Financial Services, *et al.*,	)	
Defendants.	)	

SECOND AMENDED ORDER

On May 27, 1993 this court issued an order granting defendants' motion for summary judgment as to all counts of plaintiffs' claim. On June 9, 1993 plaintiffs filed a motion for reconsideration of the May 27 Order and a motion for leave to file suggestions exceeding fifteen pages in support of their motion for reconsideration. Upon a showing of good cause and there being no opposition by the defendant, plaintiff's motion to file suggestions exceeding fifteen pages is granted.

In deciding plaintiff's motion for reconsideration of the summary judgment Order of May 27, 1993, the court finds that defendants' motion for summary judgment, although directed at all of plaintiffs' claims, centered on the issue of reasonable reliance with regards to the fraud claims in Count I and V of plaintiffs' complaint. Defendants did not, however, set forth sufficient arguments with regards to the claims in Counts II through IV to warrant granting summary judgment.

Consequently, the May 27, 1993 Order for summary judgment is rescinded as to Counts II through IV. If defendants wish to renew their motion for summary judgment on these counts

they must file a motion which addresses these claims specifically. The Order of May 27, 1993 is amended as follows.

I. Introduction

Plaintiffs are seeking to recover funds lost in various investments orchestrated by defendant, DiSette, who was allegedly acting within his capacity as an employee of the other three defendants (known collectively herein as Cigna).[1/] Plaintiffs filed this action in state court and defendants subsequently removed to federal court. On January 29, 1993, plaintiffs filed an Amended Complaint which states five counts: Count One alleges that DiSette, acting as an employee of Cigna, made fraudulent representations to plaintiffs concerning investments; Count Two alleges that DiSette, acting as an employee of Cigna, violated his fiduciary duty to plaintiffs; Count Three alleges as an alternative to Counts One and Two, that DiSette, acting as an employee of Cigna, acted negligently towards plaintiffs; Count Four alleges that Cigna was negligent in hiring and supervising DiSette; and Count Five alleges that defendants' actions were unlawful under the Missouri Merchandising Practices Act, specifically Mo. Rev. Stat. § 407.020.1 (1986). Plaintiff also seeks punitive damages in Counts One, Two and Five.

Defendants move for summary judgment arguing that: (1) Plaintiff DeBlase's action is precluded (for the most part) by the controlling statute of limitations; and (2) Written disclosures to the plaintiffs negate all claims flowing from alleged oral representations made by DiSette to plaintiffs.

II. Standards Governing Summary Judgment

A movant is entitled to summary judgment pursuant to Fed. R. Civ. P. 56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

1/ The other named defendants are Cigna Individual Financial Services Company, Cigna Corporation and Cigna Securities.

The moving party bears the burden of proof. *Aetna Life Ins. Co. v. Great National Corp.*, 818 F.2d 19, 20 (8th Cir. 1987). When considering a motion for summary judgment, the court must scrutinize the evidence in the light most favorable to the non-moving party, according the non-moving party the benefit of every factual inference and resolving all doubts as to the facts or existence of any material fact against the moving party. *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 179-80 (W.D. Mo. 1985).

Recently, the Supreme Court has redefined the standards to be considered in ruling on summary judgment motions. Where, as in this case, the party moving for summary judgment does not bear the ultimate burden of persuasion at trial that party must make a prima facie showing "that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). This burden is met when the moving party identifies those portions of the record demonstrating an absence of a genuine issue of material fact. *Id.* at 323.

If the moving party meets this requirement, the burden shifts to the non-moving party who must produce sufficient evidence to manifest a dispute as to the material facts. To successfully meet this burden the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 474 U.S. 242, 248 (1986). Finally, "[i]n assessing whether a material fact is subject to a genuine dispute, a court should employ a standard essentially identical to that governing a motion for directed verdict under Rule 50(a)." *Id.* at 250. If a rational trier-of-fact, considering the record as a whole, could not find in favor of the non-moving party, then a trial is unnecessary. *Matsushita*, 475 U.S. at 586.

III. Analysis

Defendants attack plaintiffs' claim on two fronts. First, defendants contend that the five year statute of limitations for all of plaintiff DeBlase's claims arising out of investments made before 1986 (eight of the ten investments made by DeBlase) was triggered by notice of the alleged misrepresentation. Second, defendants

attack the allegation underlying all of plaintiffs' claims, arguing that no fraud or misrepresentation exists as a matter of law.[2/]

Defendants' contention that the statute of limitations for all of plaintiffs' claims begins with notice of the alleged misrepresentation is erroneous. The statute of limitations for the claims based on fraud in Counts I and V is triggered by discovery of fraud. Mo. Rev. Stat. § 516.120(5). The statute of limitations for plaintiffs' claims of breach of fiduciary duty and negligence, however, commences when damages are sustained. Mo. Rev. Stat. § 516.100.

A. Summary Judgment on Counts I and V

Plaintiffs' claims in Counts I and V sound in fraud. Count I alleges that DiSette made fraudulent representations. Count V alleges that defendants violated the Missouri Merchandising Practices Act.[3/] Because plaintiffs' claim for violation of the Merchandising Practices Act hinges on the allegations that DiSette made material and fraudulent misrepresentations to plaintiffs, Count V is also dependent on the existence of fraud or misrepresentation.

Both of defendants' arguments regarding the fraud claims in Counts I and V turn on the issue of notice. The answer to a single question will ultimately decide both prongs of defendants' motion regarding these claims: When were plaintiffs put on notice that the investments were not low-risk, stable investments but were volatile and speculative in nature?[4/] Defendants contend that the

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[2/] The primary allegation undergirding plaintiffs' claims is that the defendants, through DiSette, made material and fraudulent oral representations concerning the degree of risk and stability of the investments made by plaintiffs. All claims are inherently linked to this allegation. Therefore, defendants seek to invalidate all of plaintiffs' claims by challenging this primary allegation.

[3/] The Missouri Merchandising Practices Act prohibits "deception, fraud, false pretenses, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise." Mo. Rev. Stat. § 407.020.1.

[4/] The answer to this question will resolve the issues presented by both prongs of defendants' motion. The point in time that DeBlase was given notice of the true nature of the investments will mark the beginning of the statute of limitations

(continued...)

"offering materials"[5] provided to plaintiffs (prior to, or at the time of, investment) clearly and unequivocally gave plaintiffs notice that the investments were high risk and not stable. Plaintiffs argue that, at a minimum, there is a genuine dispute of fact concerning when they received notice of the investment's risks.

There is no dispute that plaintiffs signed subscription agreements contemporaneously with each investment. Defendants contend that these subscription agreements provided the critical notice to plaintiffs in two respects. First, in most cases the express terms of the agreements themselves stated that the investments were high risk.[6] Second, the subscription agreements, in one form or another, provided that plaintiffs had "received and read or reviewed" each PPM (detailing the high risk nature of the investments) accompanying the individual investments. The PPMs leave no doubt as to the high risk, speculative nature of the limited partnership investments.[7] Indeed, the PPMs often began with

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[4] (...continued)
period for fraud. Further, if notice of the high risk nature of the investments preceded, or was contemporaneous with, the investments, plaintiffs' fraud and misrepresentation claims must fail as a matter of law.

[5] Defendants define the "offering materials" as written disclosures provided to plaintiffs including an investor questionnaire, a subscription agreement and a private placement memorandum (a document similar to a prospectus, referred to hereafter as a "PPM").

[6] The following subscription agreements (attached as exhibits to Defendants' Suggestions in Support of the Motion for Summary Judgment) signed by DeBlase clearly indicated the high risk associated with the investments: Exhibit F-1, p. D-3 ¶ 4(k)(i); Exhibit F-2, p. D-3 ¶ 4(k)(i); Exhibit F-3, p. C-3 ¶ 4(k)(i); Exhibit F-4, p. D-3 ¶ 4(k)(i); Exhibit F-5, p. C-3 ¶ 5(l)(i); Exhibit F-7, p. E-2 ¶ 3(l)(i); Exhibit F-9, p. B-5 ¶¶ 4(j) & 4(l); and Exhibit F-10, p. IV-6 ¶¶ 8 & 20. Those signed by Cerra stating the risks involved are: Exhibit G-1, p. B-5 ¶¶ 4(j) & 4(l); Exhibit G-2, p. IV-6 ¶¶ 8 & 20; and Exhibit G-4, p. 3 ¶ 3(b).

[7] The PPMs associated with the DeBlase investments repeatedly indicated the high risk involved with these investments. *See* Exhibit F-1, pp. (ii) & 32; Exhibit F-2, pp. (ii) & 30; Exhibit F-3, p. (iii); Exhibit F-4, p. (ii); Exhibit F-5, pp. (iv-v) & 45; Exhibit F-6, pp. (i) & 19; Exhibit F-7, pp. (i) & 26; Exhibit F-8, pp. (i) & 27; Exhibit F-9, pp. v & 45; and Exhibit F-10, cover page and pp. (i) & 49. The PPMs associated with Cerra's investments also clearly stated the risks
(continued...)

capitalized, bold-faced warnings such as: **THE INVESTMENT INVOLVES A HIGH DEGREE OF RISK.** Further, throughout the text of the various PPMs the speculative nature of the investments was clearly and redundantly manifested.

To grant summary judgment in favor defendants, the court must ultimately find that the *only* conclusion that a rational trier-of-fact could reach is that plaintiffs had notice of the speculative nature of the investments prior to, or at the time of, investment (or in the case of DeBlase, beyond the statute of limitations). *See generally Matsushita*, 475 U.S. at 586. The linchpin of defendants' motion is the claim that the signed subscription agreements establish, as a matter of law, that plaintiffs invested money with full notice of the true nature of the investments. With full disclosure to plaintiffs of the risks involved in these investments, defendants argue that plaintiffs' claims of misrepresentation and fraud must fail as a matter of law. The court agrees and will grant the motion for summary judgment accordingly.

Plaintiffs' defense to the motion is that they signed the subscription agreements without reading the offering materials and that DiSette "went to great lengths to conceal material information from the plaintiffs." Plaintiffs' Suggestions in Opposition to the Motion for Summary Judgment, p. 15. That is, DiSette allegedly assured plaintiffs that they did not need to read the offering materials and thereby deceitfully deprived them of the knowledge contained in the written disclosures. "[B]oth plaintiffs have testified that they often time were not even given an opportunity to read the entire document, and [were] simply presented with a stack of documents with post-it notes indicating where they should sign. DeBlase even testified that there were occasions when the *only* page he received of the multi-page documents was the one which he was to sign." Plaintiffs' Suggestions in Opposition to the Motion for Summary Judgment, p. 14 (emphasis in original). The court rejected plaintiffs' argument.

2/ (...continued)
involved. *See* Exhibit G-1, pp. v & 45; Exhibit G-2, cover page and pp. (i) & 49; Exhibit G-3, pp. (i) & 27; Exhibit G-4, pp. (i) & 18; and Exhibit G-5, pp. (ii) & 48-49.

The subscription agreements and the PPMs unequivocally stated the inherent risk of the investments. Plaintiffs had full knowledge of the existence of all these documents (they signed the subscription agreements and the agreements clearly referenced the PPMs) and simply chose not to review them. There has been no evidence that DiSette refused to produce these documents upon request, prevented plaintiffs from examining these documents or otherwise concealed their existence. Instead, plaintiffs seem to infer that DiSette's alleged assurances that plaintiffs need not review these documents somehow prevented them from examining the documents. The court cannot agree. Knowing that these documents existed, plaintiffs made a conscious choice not to bother themselves with the specific information available to them. Rather, plaintiffs signed the subscription agreements without review and now claim that their reliance on the alleged oral assurances of DiSette should insulate them from the disclosures made in the agreements. This position is untenable.

"Under Missouri law, a person who has an opportunity to read a document but signs it without doing so is held to have knowledge of the document's contents, absent a showing of fraud." *United States of America for the use of Bussen Quarries, Inc. v. Thomas*, 938 F.2d 831, 833 (8th Cir. 1991). Plaintiffs have failed to make any showing that fraud prevented them from understanding what the subscription agreements clearly stated; specifically, that the investments carried a high risk and that plaintiffs had "received and read or reviewed" the PPMs. The *Bussen Quarries* presumption is not invalidated simply because some kind of alleged fraud exists in the action. Rather, this court understands *Bussen Quarries* to mean that the presumption is valid unless the alleged fraud either created a misapprehension as to the meaning or effect of the signed agreement, or induced plaintiffs to sign. The fraud alleged by plaintiffs does not affect the validity of the signed subscription agreements and therefore plaintiffs are deemed to have full knowledge of the subscription agreements and PPMs.[8/]

[8/] Plaintiffs seem to argue two related manifestations of the alleged fraud: (1) That plaintiffs should rely totally on DiSette without reading the offering materials; and (2) The original statements of DiSette concerning the low-risk nature and stability of the investments. The court finds that plaintiffs have not set forth

(continued...)

Further, this court finds the Eighth Circuit's decision in *Davidson v. Wilson*, 973 F.2d 1391 (8th Cir. 1992), dispositive of plaintiffs' argument. In *Davidson*, the court was faced with two investors suing the agent, and the securities company employing the agent, that sold them shares in a high risk limited partnership. *Id.* at 1392. The plaintiffs alleged fraud because the investments did not meet alleged oral representations made by defendants. *Id.* However, the plaintiffs received and signed subscription agreements prior to making the investments. *Id.* at 1399. These agreements made clear the risky nature of the investments and also referenced other documents disclosing the risks involved. *Id.* at 1396-1400.

The district court granted defendants' motion for summary judgment, holding that the plaintiffs "may not justifiably close their eyes to the written materials and rely only upon the oral statements, and that [plaintiffs] accordingly are charged with constructive knowledge of the written materials available to them." *Id.* at 1398. The Eighth Circuit affirmed, finding that:

> a sophisticated investor, confronted with a written document which contained repeated references to two other documents . . . and that also contained explicit disclaimers . . . did not justifiably rely upon any contradictory oral representations. There was ample reason for [plaintiffs] to take the position, that they would not move ahead and make investment payments until such references and representations were clarified to their satisfaction. Thus, we agree with the district court that, based upon the facts of this case, [plaintiffs'] claimed reliance upon [defendant's] oral representations was unjustifiable as a matter of law.

(...continued)
specific facts showing that DiSette represented that the investments were stable and low risk. However, even assuming that these representations did occur does not allow plaintiff to overcome the *Bussen Quarries* presumption. Fraud as to the speculative nature of the investments did not prevent DeBlase from understanding the content or effect of the subscription agreements, nor did it fraudulently induce plaintiffs to sign. Further, while DiSette's alleged assurances to plaintiffs may have been poor counsel, it does not rise to the level of fraud. Accordingly, the court finds that plaintiff have failed to show any possible fraud foreclosing the *Bussen Quarries* presumption.

Id. at 1401.

The factual and legal similarities between this action and *Davidson* compel an identical result. Admittedly, plaintiffs DeBlase and Cerra are not as financially sophisticated as the investors in *Davidson*, but neither are they unsophisticated.[9/] Plaintiff DeBlase is highly educated with significant experience in investing and financial matters. Deposition of Joseph DeBlase, pp. 33-34, 47, 48, 56, 64, 66, 68 & 72-73. Plaintiff Cerra has owned and operated two successful construction corporations for a number of years.[10/] Deposition of Ben Cerra, p. 10-13. Armed with a reasonable degree of business sophistication, plaintiffs were confronted with subscription agreements containing explicit disclaimers as to risk and/or referencing additional risk-disclosing documents. Plaintiffs made a knowing and intelligent waiver of their right to review these materials before investing and relied blindly on the alleged oral representations of DiSette. Given these facts, the court must find that plaintiffs' "claimed reliance upon [defendant's] oral representations was unjustifiable as a matter of law." *Id.* at 1401.[11/] Defendants' motion for summary judgment

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[9/] Plaintiffs have set forth considerable facts in an effort to establish their financial unsophistication. However, the significance of sophistication is muted by the patent and unequivocal risk disclosures in the subscription agreements and PPMs. The court finds that no great degree of sophistication was needed to be aware of the speculative nature of plaintiffs' investments.

[10/] Plaintiff Cerra also indicated on one subscription agreement that "I have such knowledge and experience in financial and business matters and in tax-oriented investments in particular that I am capable of evaluating the merits and risks of an investments in the securities." Defendants' Suggestions in Support of the Motion for Summary Judgment, Exhibit G-5, p. A-1-7.

[11/] The court in *Davidson* reviewed the plaintiffs' claim of justifiable reliance within the analytical framework set forth in *Zobrist v. Coal-X, Inc.*, 708 F.2d 1511 (10th Cir. 1983). In reviewing claims of justifiable reliance, the relevant factors are:

> (1) the sophistication and expertise of the plaintiff in financial and securities matters; (2) the existence of long standing business or personal relationships; (3) access to the relevant information; (4) the existence of a fiduciary relationship; (5) concealment of the fraud; (6) the opportunity to detect the fraud; (7) whether the plaintiff initiated

(continued...)

is granted as to Counts I and V.

B. Summary Judgment on Counts II through IV

Defendants' argument that the statute of limitations for the claims in Counts II through IV for breach of fiduciary duty and negligence is inaccurate. The statute of limitations for these claims commences when damages are sustained. Mo. Rev. Stat. § 516.100. Consequently, the court will not consider defendants' argument that the statute of limitations on Counts II through IV has run.

The court looks next at defendants' substantive argument for summary judgment on Counts II through IV. Defendants contend that the claims for breach of fiduciary duty and negligence are rooted in the allegations of fraud and misrepresentation and that because no fraud or misrepresentation occurred, summary judgment should be granted on these claims. While defendants have focused on the lack of fraud and misrepresentation they have not sufficiently discussed the issues specific to the claims for breach of fiduciary duty and negligence. The court is, thus, reluctant to grant summary judgment without further argument regarding these claims. Therefore, defendants' motion for summary judgment is denied for Counts II through IV.

11/ (...continued)

the stock transaction or sought to expedite the transaction; and (8) the generality or specificity of the misrepresentations.

Davidson, 973 F.2d at 1400 (quoting *Zobrist*, 708 F.2d at 1516). In addition to finding plaintiffs reasonably sophisticated in financial matters, this court finds the other factors weigh heavily in favor of granting the motion for summary judgment. Most significantly, the court finds that plaintiffs had full access to the relevant information (although they chose to ignore the materials); it cannot reasonably be found that DiSette concealed this information; and plaintiffs had every opportunity to detect the alleged fraud by simply reading the documents they signed and/or represented that they had reviewed.

In weighing all of the *Zobrist* factors applied in *Davidson*, this court finds that plaintiffs are not, as a matter of law, entitled to the protections of justifiable reliance.

Accordingly, it is ORDERED that:

(1) plaintiff's motion for reconsideration of this court's summary judgment Order of May 27, 1993 is GRANTED in part and DENIED in part pursuant to this Order;

(2) plaintiff's motion to file suggestions exceeding fifteen pages in support of the motion for reconsideration is GRANTED;

(3) defendants motion for summary judgment is GRANTED in part and DENIED in part pursuant to this order;

(4) this Order amends and supersedes this court's Order of May 27, 1993.

Fernando J. Gaitan, Jr.
United States District Judge

Dated: November 17, 1993
Kansas City, Missouri

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Dr. Joseph C. DeBlase et al.,	)	
Plaintiffs,	)	
vs.	)	No. 91-0642-CV-W-2
Cigna Individual Financial Services Company, et al.,	)	
Defendants.	)	

ORDER

On May 27, 1993, this court issued an order granting defendants' motion for summary judgment as to all counts of plaintiffs' complaint. On June 9, 1993, plaintiffs filed a motion for reconsideration of the May 27 Order. On November 17, 1993, the court, upon reconsideration, upheld the May 27 Order granting summary judgment as to Counts I and V, but denied summary judgment as to Counts II through IV for lack of specific arguments regarding these claims. The November 17 Order allowed defendants to renew their motion for summary judgment as to Counts II through IV by specifically addressing the claims. Defendants renewed their motion for summary judgment and, on March 29, 1994, this court issued an order granting summary judgment on the remaining claims. Pending before this court is plaintiffs' motion to reconsider the March 29 order.

Plaintiffs assert that this court's order was prepared without benefit of *The Jacobs Manufacturing Company v. Sam Brown Co.*, No 92-1834WM (8th Cir. March 28, 1994), the most

recent decision of the United States Court of Appeals for the Eighth Circuit regarding fraud. Plaintiffs allege that this court's order is inconsistent with *Jacobs*, and urge the court to reinstate all counts of their complaint.

In deciding *Jacobs*, the Eighth Circuit relied on two earlier decisions interpreting Missouri law, *Pinken v. Frank*, 704 F.2d 1019, 1024-26 (8th Cir. 1993) and *Essex v. Getty Oil Company*, 661 S.W.2d 544, 550 (Mo. App. 1983). This court has reviewed these cases, but finds them plainly distinguishable from the case at bar.

Jacobs involves a manufacturer (Jacobs) and its distributor (Brown). When Jacobs initially approached Brown about becoming a distributor, Brown read the written distributorship agreement, but expressed concern about certain terms limiting the relationship to a one-year period, and permitting Jacobs to sell directly to original equipment manufacturers (thus bypassing the distributor). Upon oral representations that the distributorship would last a "lifetime" if Brown performed well, and that Jacobs would refer all original equipment manufacturer inquiries in Brown's exclusive territory to Brown, Brown signed the agreement.

In *Pinken*, Frank was asked to execute promissory notes that were, by their terms, payable on a date certain. Frank was aware of the maturity date, but was induced to sign the notes by oral representations that the instruments would not be enforced unless certain conditions were met. *Pinken*, 704 F.2d at 1021-22. In *Essex*, a filling station owner was approached by an oil company to become a lease operator of a company filling station. During the course of negotiations, the owner expressed concern about certain terms in the lease permitting either party to terminate the lease agreement on 30-days written notice. Upon oral assurances that the language in the lease was merely a formality, and that the owner could remain in the location until he decided to retire, the owner signed the agreement. *Essex*, 661 S.W.2d at 547-48.

Jacobs, *Pinken*, and *Essex* involve situations in which a party had read or was otherwise aware of the written terms of an agreement, but was induced to sign the agreement by oral representations that the agreement would not be enforced as written. Thus, the issue decided by these cases is whether a party to a contract may "justifiably rely on the representation of the other

party that the written agreement will not be enforced according to its terms." *Pinken*, 704 F.2d at 1024. That is not the issue in this case. Plaintiffs were not persuaded to invest based on defendants' representations that the degree of risk, as described in the written materials, was less than stated in the written materials. Instead, plaintiffs invested without reading the very documents that would have alerted them to the degree of risk they were assuming. Neither *Jacobs*, nor any of the cases upon which *Jacobs* relies, provide a basis for relief under those circumstances.

Accordingly, it is ORDERED that plaintiff's motion to reconsider is DENIED.

Fernando J. Gaitan, Jr.
United States District Judge

Dated: April 21, 1994
Kansas City, Missouri

APPENDIX D

SUPREME COURT OF MISSOURI

en banc

March 29, 1995

Charles Cochran, et al.,	)	
	)	
Appellants,	)	
	)	
vs.	)	No. 76910
	)	Circuit Court No.
Daniel Christian Giddens,	)	616998
et al.,	)	
	)	
Respondents.		

ORDER

The Court having been advised by counsel for the parties that the above entitled cause has been fully settled and that the case has been dismissed by the Circuit Court of St. Louis County, the appeal herein is ordered dismissed as moot.

Day - to - Day

Ann K. Covington, Chief Justice

STATE OF MISSOURI-SCT.:

I, THOMAS F. SIMON, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the order of said court, entered on the 29th day of March 1995, as fully as the same appears of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court. Done at office in the City of Jefferson, State aforesaid, this 24th day of April, 1995.

Thomas Simon, Clerk
Christina Simon, D.C.

APPENDIX E

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Missouri Constitution, Article V, section 10, provides:

> Cases pending in the court of appeals shall be transferred to the supreme court when any participating judge dissents from the majority opinion and certifies that he deems said opinion to be contrary to any previous decision of the supreme court or of the court of appeals. Cases pending in the court of appeals may be transferred to the supreme court by order of the majority of the judges of the participating district of the court of appeals, after opinion, or by order of the supreme court before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule. The supreme court may finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as an original appeal.

Missouri Supreme Court Rule 83.09 provides:

> DETERMINATION OF CASES FOLLOWING TRANSFER
>
> Any case coming to this Court from a district of the Court of Appeals, whether by certification, transfer or certiorari, may be finally determined the same as an original appeal. If, however, in cases transferred on order of this Court, the Court concludes that the transfer was improvidently granted, the case may be retransferred to the Court of Appeals.